

Historical Title, Self-Determination and the Kashmir Question

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Historical Title, Self-Determination and the Kashmir Question

Changing Perspectives in International Law

By

Fozia Nazir Lone



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To the people struggling for their rights



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Foreword

The author deals in this study with several core questions of public international law namely historic title to a territory, the right of self-determination and the inviolability of national borders. As such this book – which being based upon a PhD thesis – qualifies as a basic dogmatic study on international law. The advantage of this study is, though, that it is quite concrete. As its title indicates correctly it applies its dogmatic findings to the situation of Kashmir. The crucial question the book identifies very clearly is what the status of Kashmir was at the moment of the establishment of India's independence and when it integrated most of Kashmir into the Indian Union. The author analyses this critical situation carefully taking into account the actions taken by the United Kingdom, including the legal assessment by the latter of the Indian actions. The author also takes into account the actions of neighboring States as well as of the international community at large and the pronouncements of the United Nations, especially the Security Council. It goes without saying that the author considers the actions taken by India as contrary to international law. The study also provides a critical legal assessment of the decolonization policy of the United Kingdom. In spite of the very careful analysis of the archival material concerned this alone would not make the study exceptional. What does so is the that the author strikes a comparison with the status of the three Baltic States in the period when they were under the occupation of the USSR and the relevance of that status when they finally were able to exercise their sovereignty fully again.

The main thesis of the study is that Kashmir at the critical date had to be regarded as a sovereign State and that – in spite of the integration of most of its territory into the Indian Union – Kashmir had not lost its sovereignty. Why this is the case is being argued thoroughly.

Since the study is dealing with one of the most controversial territorial disputes it will be criticized. However, the ensuing discussion will certainly revive not only the discussion about Kashmir but also about how the international community should deal with illegal occupation. Already seen from this point of view the study constitutes an important enrichment and will contribute positively to the further development of international law.

Em. Professor Dr. Rüdiger Wolfrum

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List of Abbreviations

A	Article
AIR	All India Reporter
APHC	All Party Hurriyat Conference
BL	British Library, London
CA	Court of Appeal
CERD	The International Convention on the Elimination of All Forms of Racial Discrimination 1966
CJK	Constitution of Jammu and Kashmir
Cmd	Command Papers
CO	Constitutional Order
COI	Constitution of India
CRO	Commonwealth Relations Office
CTBT	The Comprehensive Test Ban Treaty
DFP	Democratic Freedom Party
DO	Dominion Office
EUPCFA	EU Parliament's Committee on Foreign Affairs
FCO	Foreign and Commonwealth Office
FO	Foreign Office
FP	Foreign Policy
FRG	Federal Republic of Germany
FRS	Fundamental Rights
FRUS	Foreign Relations of the United States
GDR	German Democratic Republic
GOIA	Government of India Act 1935
GOI	Government of India
GOP	Government of Pakistan
HCD	House of Commons Debates
HCL	House of Commons Library
HCOR	House of Commons, Official Report
HCP	Habeas Corpus Petition
HCPP	House of Commons Parliamentary Papers
HCW	High Court Writ
HLOR	House of Lords, Official Reports
HLRO	House of Lords Record Office
HMSO	His Majesty's Stationary Office
HRC	Human Rights Committee

HW	Letter code for Wartime Headquarters of the Government Code and Cypher School (GC&CS)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IC	International Community
IIA	Indian Independence Act
ILC	International Law Commission
IOA	Instrument of Accession
IOK	India Occupied Kashmir
IOR	India Office Records
IPC	Indian Penal Code
J&K	Former State of Jammu and Kashmir
JKA (J)	Jammu and Kashmir Archives, Jammu Repository
JKA (S)	Jammu and Kashmir Archives, Srinagar Repository
JKA	Jammu and Kashmir Archives
JKCA	The J&K Constituent Assembly
JKLF	Jammu Kashmir Liberation Front
JKJ	Jammu and Kashmir Judgements
JKLR	Jammu & Kashmir Law Reporter
KFOR	Kosovo Force
KLA	Kosovo Liberation Army
LOC	Line of Control
LON	League of Nations
LP	Legal Position
MB	Mountbatten Papers, Special Collections Databases, the Hartley Library, University of Southampton
Mss Eur	Manuscripts European (British Library, India Office Records: Private Papers)
NAI	National Archives of India
NAL	The National Archives, London (Kew)
NC	All Jammu and Kashmir National Conference
NCM	National Commission for Minorities
NDTV	New Delhi Television
NHRC	National Human Rights Commission
NPT	The Nuclear Non-Proliferation Treaty
NSGT	Non-Self-Governing Territories
NWFP	North West Frontier Province
OER	Old English Records
OWP	Other Writ Petition: OWP

PCA	Permanent Court of Arbitration
PF	Plebiscite Front
PHRA	The Protection of Human Rights Act 1993
POK	Pakistan Occupied Kashmir
QB	Queen's Bench
RdC	<i>Recueil des cours de l'Académie de droit international</i>
Samvat	Term used to refer to era used in Hindu calendars. In Kashmir <i>Vikrama</i> Samvat was prevalent. In order to convert dates to the currently used Gregorian calendar 57 or 56 years are added.
SCOR	Security Council Official Record
SCR	Security Council Resolution
SC	Supreme Court
SHRC	State Human Rights Commissions
SLJ	Srinagar Law Journal
S	Section
TOA	Treaty of Amritsar
TWAIL	Third World Approach to International Law
UJC	United Jihad Council
UNAMET	UN Mission in East Timor
UNC	United Nations Charter
UNCHR	United Commission for Human Rights
UNCIP	United Nations Commission for India and Pakistan
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNMIK	UN Interim Administration Mission in Kosovo
UNMOGIP	United Nations Military Observer Group in India and Pakistan
UNMPTAK	(Proposed) UN Military-Political Transitional Administration for Kashmir
UNTAET	UN Transitional Administration in East Timor

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PART 1

*Introduction to the Factual and
Legal Framework*



Introduction: Disputed Heritage in Search of Harmony

International law's normative approach to claims of external self-determination has always been suspended on the formalistic clash between territorial entitlement and the inviolability of borders.¹ The concept of the inviolability of territorial integrity also remains as one of the greatest impediments to the realisation of the historical territorial entitlement of certain peoples.²

- 1 Khazar Shirmammadov, 'How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination? The Case of Crimea' (2016) 4(1) *Russian Law Journal* 61; Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004).
- 2 Lea Brilmayer, 'The Institutional and Instrumental Value of Nationalism' in D. Wippman (ed), *International Law and Ethnic Conflict* (Cornell University Press 1998) 58; Martti Koskeniemi, 'The Future of Statehood' (1991) 32 *Harvard International Law Journal* 397; Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normatively and Power in International Law* (Brill-Nijhoff 2003) 289; Kazimierz Maolej Smogorzewski, 'Lithuania', *Encyclopedia Britannica* (1961) 217; Ruta M Kalvaitis, 'Citizenship and National Identity in the Baltic States' (1998) 16 *Boston University International Law Journal* 231, 237; William J. H. Hough III, 'The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory' (1985) 6 *New York Law School Journal of International and Comparative Law* 301, 391–446; Igor Grazin, 'The International Recognition of National Rights: The Baltic States' Case' (1991) 66 *Notre Dame Law Review* 1385, 1402–03, 1407; Arnold D. McNair, 'The Stimson Doctrine of Non-Recognition' in DJ Harris, *Cases and Materials on International Law* (6th edn, Thomas, Sweet & Maxwell 2004) 219; Roger S. Clark, 'The Timor Gap: The Legality of the "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia"' (1992) 4 *Pace International Law Review* 69; Shirmammadov, (n 1); Buchanan (n 1); Justin A. Evison, 'MiGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of *Uti Possidetis* and Internationally Recognized Self-Determination' (2014) 220 *Military Law Review* 90, 105–06; Amandine Catala, 'Secession and Annexation: The Case of Crimea' (2015) 16 *German Law Journal* 581, 585, 601–02; Gabriele Steinhauser, 'Human Rights Worsen in Crimea, Report Says: Council of Europe Cites Allegations of Politically Motivated Killings and Disappearances' *The Wall Street Journal* (New York, 27 October 2014) <<http://www.wsj.com/articles/human-rights-worsen-in-crimea-report-says-1414416579>> accessed 19 December 2016; PR Chari, Hasan Askari Rizvi,

This formalism has been exploited by states through military might and power politics, causing gross human rights violations and pushing the world into a perpetual war over territorial claims.

Statesmen ignore the right to self-determination of peoples 'at their peril'.³ When states adopt policies of appeasement towards aggressors and allow for selective self-determination, their efforts tend to be counterproductive. As history shows, aggressive governments from all over the world have used force to occupy territories, such as the 1931 Japanese invasion of Manchuria in the northeast region of China and Germany's annexation of Austria in 1938.⁴ In the aftermath of such aggression, allowing self-determination to minorities has proved a viable solution, as seen in the context of the Ottoman and Austro-Hungarian empires.⁵

In light of the underlying interrelationships within international law between, among others, ideas relating to independence, territory and occupation, this book aims to re-examine the 70-year-old unresolved Kashmir question from a multidisciplinary approach that combines law, politics, and history. There will also be a review of the substantive law on the restoration of historical title and self-determination (including the United Kingdom's policy of political self-determination and the conduct of plebiscites in its dependencies) along with concepts such as statehood, state continuity/identity, state extinction, occupation, unrepresentative government, and human rights violations. As the study shows, the right to the restoration of historical title and the right to self-determination are independent principles that are both capable of being the basis for claiming independence for the 'people'.⁶ For instance,

Rashid Ahmed Khan and D Suba Chandran, *The Kashmir Dispute: Making Borders Irrelevant* (Samskriti 2009); Ananya Jahanara Kabir, *Territory of Desire: Representing the Valley of Kashmir* (University of Minnesota Press 2009); Fozia Nazir Lone 'The Creation Story of Kashmiri People: The Right to Self-Determination' (2009) 21 Denning Law Journal 1.

- 3 WWI Document Archives, 'President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances' delivered in Joint Session, 11 February 1918 <https://www.lib.byu.edu/index.php/President_Wilson's_Address_to_Congress,_Analyzing_German_and_Austrian_Peace_Utterances> accessed 20 December 2016.
- 4 Michael Freeman, 'National Self-Determination, Peace and Human Rights' (1998) 10 Peace Review: A Journal of Social Justice 157; Richard N Current, 'The Stimson Doctrine and the Hoover Doctrine' (1954) 59 The American Historical Review 513.
- 5 However, Bulgarians and Turks in the Ottoman Empire were not accepted as aspirants of self-determination because they were seen as collaborators with Germany in World War I. See, Shirmammadov (n 1) 69.
- 6 Steny H Hoyer, 'Implementation of the Helsinki Accords: Baltic Leadership on Status of Independence Movements – Appendix, Democracy Under Siege' (1990–1991) 17 Series 3

subsequent to the occupation and use of military force by the Soviet Union in the Baltic States and by Indonesia in East Timor, the international community denounced the occupiers' attempts to acquire title by annexation on the basis that these acts were in breach of the *jus cogens* norm of the prohibition against aggression. One of the reasons for the general prohibition of aggression is that it undermines the right to self-determination.⁷ It is apparent that the applicability of the right to self-determination to colonised people has achieved the status of a 'paramount principle',⁸ 'legal right'⁹ and 'a form of *jus cogens*'¹⁰ under contemporary international law. However, in the present world there are many peoples (such as Palestinians and Kashmiris) who are still struggling to have the freedom to exercise their right to self-determination, notwithstanding the fact these disputes have colonial roots.¹¹

This book, based on primary archival documents, aims to introduce readers to the major historical antecedents that have led to the Kashmir dispute.

Basket III Hearings before the U.S. on Security and Cooperation in Europe and Other Congressional Hearings Reports and Prints 33, 34; Edward T Canuel, 'Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence' (1997) 20 Boston College International and Comparative Law Review 85, 115.

- 7 Clark, (n 2) 69; See, Michael Shane French-Merrill, 'The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached Its International Obligations in Ratifying the Timor Gap Treaty' (2000) 8 Cardozo Journal of International and Comparative Law 285, 317; Roger S Clark, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression' (1980) 7 Yale Journal of World Public Order 2; Mälksöo, (n 2) 289; Shirmammadov, (n 1) 61.
- 8 *Case Concerning East Timor (Portugal v Australia)* General List No 84 (1995) 1CJ, 102, para 29.
- 9 The Right of Peoples and Nations to Right to Self-Determination, UNGA Res 637(VII) (1952) UN Doc A/RES/637(VII), para 3; UNGA Res 742 VIII (27 November 1953) UN Doc A/RES/742(VIII), para 4; Recommendations concerning international respect for the right of peoples and nations to self-determination, UNGA Res 1188 (XII), (11 December 1957) UN Doc A/RES/1188(XII); Resolution defining the three options for self-determination UNGA Res 1541(XV) (15 December 1960) UN Doc A/RES/ 1541(XV); Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations UNGA 2625 (XXV) (24 October 1970) UN Doc A/RES/2625(XXV).
- 10 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolutions 176* (Advisory Opinion) (1971) 1CJ Rep 276, 16.
- 11 David J Thompson, 'Climbing the Iron Wall: Palestine and Self-Determination' (2003) 12 Griffith Law Review 288, 292; Marc Weller, 'Settling Self-determination Conflicts: Recent Developments', (2009) 20 European Journal of International Law 111, 113.

It then systematically applies the substantive law on the restoration of historical title and self-determination to the factual circumstances. This approach sheds light on a new area of the study relating to the Kashmir question and, as such, is a valuable contribution to international scholarship. As the book demonstrates, hostilities between India and Pakistan were not inevitable but were rather triggered by the failure of Britain to make adequate provisions for the postcolonial order, particularly with regard to the future of the princely states.¹² Subsequent to decolonisation in 1947 and British India's division into India and Pakistan, these new states battled to annex the Princely State of Kashmir¹³ (which was an independent entity). This led to its division and the attempts to legally incorporate the entire territory of Kashmir into the Union of India through Article 1(3)¹⁴ and 370¹⁵ of the Indian Constitution (1950) and legislation passed by India's nominated regional body in Kashmir (hereinafter referred to as the Pro-Indian or Nominated Government). India's incorporation of the former Princely State of Kashmir was carried out despite India not having physical possession over the whole territory,¹⁶ which was partly annexed by Pakistan (Pakistan Occupied Kashmir – POK) and China (Aksai Chin) in 1947 and 1962 respectively. The representative capacity of Kashmir's Nominated Government, which was installed by India, has been rejected in Security Council Resolution 122.¹⁷ Militarism and human rights violations such as mass extrajudicial killings, disappearances, and rape, have dominated the governance in Indian Occupied Kashmir (IOK).¹⁸ The main focus of this study is IOK, though POK and Aksai Chin (under Pakistan and China respectively)

12 Brian Farrell, 'The Role of International Law in the Kashmir Conflict' (2002–2003) 21(2) Penn State International Law Review 293, 294.

13 Prem Shankar Jha, *The Origins of a Dispute-Kashmir 1947* (OUP 2003) 17; Chitrallekha Zutshi, *Languages of Belonging – Islam, Regional Identity and the Making of Kashmir* (Hurst Company 2004) 3; Henry Vincent Hodson, *The Great Divide- Britain-India-Pakistan* (OUP 1988); GS Chhatra, *Advanced Study in the History of Modern India* (Lotus Press 2007).

14 Article 1 (3) (c) of the Indian Constitution 1950, 'the territory of India shall comprise of – (a) the territories of the States...such other territories as may be acquired'.

15 Mohan Krishen Teng, *Kashmir Article 370* (Anmol Publications 1990) 76; GH Khan, *Government and Politics of Jammu and Kashmir* (J.V. Printers 1988).

16 Lone (n 2); Alastair Lamb, *Kashmir: A Disputed Legacy 1846–1990* (OUP 1991); Sten Widmalm, *Kashmir in Comparative Perspective: Democracy and Violent Separatism in India* (Routledge 2002); Cabeiri Debergh Robinson, 'Too Much Nationality: Kashmiri Refugees, the South Asian Refugee Regime, and a Refugee State, 1947–1974' (2012) 25 Journal of Refugee Studies 344.

17 UNSC Res 122 (24 January 1957) UN Doc S/RES/122 (1957).

18 *Unreported World: Killing of Kashmir*, Channel 4 Documentary, 8 April 2004.

are discussed to the extent necessary to substantiate legal arguments. This approach is adopted because (1) IOK is the most populated part of the former Princely State of Kashmir; (2) it has been constitutionally incorporated into the Union of India, which neither Pakistan nor China have done in relation to their respective claims over POK and Aksai Chin; (3) it is militarily controlled by India with the assistance of 700,000¹⁹ troops, who have been involved in massive human rights violations in Kashmir; and (4) India has refused to fulfill the commitment it made to conduct a plebiscite to determine the status of the territory of Kashmir.

This study, which has a strong international law standpoint and is based on comprehensive archival documents, seeks to expose some central assumptions and address matters that are crucial to the discussion of the Kashmir question within international law. These include whether, historically, Kashmir was a state; whether its territory was occupied in the war of 1947 by India and Pakistan; what implications the constitutional incorporation of an occupied territory and human rights violations attract within international law; and whether it is arguable that Kashmiris could be entitled to the restoration of their historical title to their territory through the exercise of self-determination.

Keeping in view the findings of historical archival research on Kashmir, including the Fitzmaurice legal opinion on the Instrument of Accession,²⁰ which was subject to the conduct of a plebiscite in Kashmir,²¹ this work

19 Rebecca Knuth, *Burning Books and Leaving Libraries-Extremist Violence and Cultural Destruction* (Praeger 2006) 77; Paul R Dettman, *India Changes Course: Golden Jubilee to Millennium* (Praeger 2001) 127.

20 FO 371/69710: Foreign Office, Minutes, Mr. Fitzmaurice, 'Validity of Kashmir's Accession to India' 25 and 27 February 1948, see the Washington telegram No 862 from the US Secretary of State, South East Asia Department, to the British Foreign Office, 25 February 1948; F 10914/10125/85: Fitzmaurice's Opinion on Legal Validity of Kashmir's Accession to India, 26 May 1949 appended to 'The Right Hon. P.J. Noel Baker (Commonwealth Relations Office) to Sir Hartley Shawcross (enclosed only)' 3 June 1949, para 1 (Unpublished Source); Opinion of the Attorney General, Sir Hartley Shawcross to Mr PJ Noel-Baker (Commonwealth Relations Office) 20 June 1949 in F 10914/10125/85: Fitzmaurice's Opinion on Legal Validity of Kashmir's Accession to India, 26 May 1949 appended to 'The Right Hon. P.J. Noel Baker (Commonwealth Relations Office) to Sir Hartley Shawcross (enclosed only)' 3 June 1949 (Unpublished Source); FO 371/84244, FL 10112/2: Confidential Letter No 1063/93/50; 11 February 1950 from British Embassy Washington to Foreign Office, London [NAL]; F 16364/10125/85: Mr. G.G. Fitzmaurice to the Attorney-General (H. W Shawcross), 12 October 1949 (Unpublished Source), see, F 13759/10125/85: Telegram from Foreign Office to New York, 24 September 1949 (Unpublished Source).

21 FO 371/129775: Letter dated 26 October 1947 from Maharaja of Kashmir to the Governor-General, Lord Mountbatten [NAL].

addresses the idea of Kashmir's statehood within international law. The distinction between statehood (which can be seen in terms of objective criteria) and the recognition of a state (which is a subjective question) will be examined.²² Since the existence of territory is a prerequisite for statehood this book will discuss, firstly, whether the loss of the territory of Kashmir mandates a loss of statehood within international law and in this context look at the concepts of restoration of historical title and self-determination. Secondly, this book will consider whether constitutive statehood could be protected by the non-recognition of occupation by other states and through their legal positions and unilateral acts.²³

The major premise of this book is that in occupation situations where the 'people'²⁴ share a unique relationship with their 'territory',²⁵ the right to self-determination becomes an instrument for the realisation of the restoration of their historical title.²⁶ This study argues that these two self-reliant principles enhance the case for independence made by occupied people that have a historical claim over their territory. This analysis is based on the Baltic States' restoration of historical title, where their communal continuity²⁷ kept their nations alive after their territory was illegally occupied, and allowed them to establish their title to their territory and resurrect the state as a continuation

22 Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (OUP 2001) 33–43; James R. Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 25–28; Ian Brownlie, 'Recognition in Theory and Practice' (1982) 53 *British Yearbook of International Law* 197, 197.

23 Lech Antonowicz, 'On the Nature of Recognition of States in International Law (A Theoretical Essay)' (1976) 8 *Polish Yearbook of International Law* 217, 220–221; Abhimanyu George Jain, 'The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory' (2014) 50 *Stanford Journal of International Law* 1, 18; Jure Vidmar, 'Territorial Integrity and the Law of Statehood' (2012) 44 *The George Washington International Law Review* 697, 708; William E Butler, 'Self-Determination, Ethnic Identity, and Comparative Law' (2013) 8(1) *Journal of Comparative Law* 297, 303.

24 UNGA Res 217 A (III) (1948) UN doc A/810 at. 71; UNGA Res 1514 (XV) (14 Dec. 1960); Antonio Cassese, *Self-Determination of Peoples-A Legal Reappraisal* (CUP 1995).

25 *Western Sahara*, Advisory Opinion, ICJ Rep, 1975, 12.

26 Mälksoo, (n 2); Lauri Mälksoo, 'Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in International Law' (2000) 69 *Nordic Journal of International Law* 289, 309; Grazin (n 2); Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993); Lawrence S Eastwood, 'Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia' (1993) 3 *Duke Journal of Comparative and International Law* 299, 316; Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Librarie Droz 1968).

27 Hoyer, (n 6) 34.

of what it had been before occupation by the Soviet Union.²⁸ Under international law, territories that were occupied through the illegal use of force, which include abandoned European colonies/territories that were occupied by neighbouring states (such as Kashmir and Western Sahara), the restoration of historical title technically remain an option. This remains particularly true in territories where a 'peaceful and continuous display of a State authority'²⁹ has not been demonstrated by the occupier. Furthermore, in the 1975 landmark *Western Sahara* case, the International Court of Justice reaffirmed the right to self-determination for a people struggling against foreign military occupation. That right means that they should be able to determine their future political status through their own freely expressed will.³⁰ In contemporary international law there is no rule that prevents people who are struggling against foreign occupation from exercising their right to self-determination in order to achieve state continuity in territory that has been annexed through the use of illegal force. In line with such principles, plebiscites were conducted in occupied Soviet Bloc states including Lithuania, Estonia, and Latvia,³¹ to determine the people's will. When these states were restored, they were seen to have state continuity despite their occupation. Therefore, the restoration of their historical title was achieved through the exercise of their right to self-determination.

As seen, the claims for the restoration of historical title in Kashmir are interconnected with the right to self-determination. This also provides an avenue to explore normative responses to Kashmir's annexation and the resulting gross human rights violations caused by unrepresentative and repressive regimes.

Despite some success stories, this study acknowledges that the application of the norms and mechanisms of international law relating to self-determination and the restoration of historical title generally depend on the factual circumstances of each individual case. The norms and assumptions underlying international law also favour sovereign states. Furthermore, the application of these concepts to the third world's abandoned territories/people—as in the case of Kashmir—remains even more problematic because within the theory

28 William C Allison, 'Self-Determination and Recent Developments in the Baltic States' (1991) 19 *Denver Journal of International Law and Policy* 625, 625; Graham Smith, 'The Resurgence of Nationalism' in Graham Smith (ed), *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania* (St Martin's Press 1994) 136.

29 *Island of Palmas* (1928) 2 *RIAA* 829, 829.

30 *Western Sahara* (Advisory Opinion) (1975) 1 *ICJ Rep* 12, 14.

31 HJ Uibopuu, 'Plebiscite' *Encyclopaedia of Public International Law* (1997) vol III, 1049, 1053.

and history of international law, such states were not considered sovereign.³² To add to this general normative difficulty, subjective elements such as politics and state interest determine the outcome of territorial claims. This study recognises that it would be naïve to assume that claims of statehood in the contemporary world are resolved by the mere application of legal rules. As such, this book explores how engendering a meaningful outcome in restoration of historical title claims often significantly depends on the support of the more powerful states in the international community. The book further explores how the military, political, and economic assistance of the international community can often dictate the outcome of self-determination claims.³³ This may explain why people were able to successfully exercise their right to self-determination in certain places such as East Timor, Kosovo, Bangladesh, and Bosnia, while others in places like Palestine, Kashmir, and Chechnya are still struggling to achieve their statehood. Bangladesh³⁴ remains the only Asian state that was able to achieve independence with the assistance of India, after Pakistan lost the 1971 Indo-Pakistani war.³⁵ All these discussions will offer a valuable understanding of the issues and provide the means to further explore the creation of a state beyond official legal texts, as well as show how unofficial and subjective sources such as power, politics, and state interests have shaped the international laws on the restoration of historical title and self-determination.³⁶

32 Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984) 3, 4, 6; Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1; Antony Anghie, 'LatCrit and TWAIL' (2011–2012) 42 *California Western International Law Journal* 311, 312.

33 See generally, Milena Sterio, *The Right to Self-determination under International Law: 'Self-istans,' Secession, and the Rule of the Great Powers* (Routledge 2013); Rein Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8 *Chinese Journal of International Law* 2; Rein Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge 1994) 195.

34 The International Commission of Jurists, 'East Pakistan Staff Study' (1972) 8 *International Commission Jurists Review*, 23, 26–34.

35 Harold H Saunders, 'What really happened in Bangladesh: Washington, Islamabad, and the Genocide in East Pakistan' (2014) 93 *Foreign Affairs* 36, 39; Information Service of the Indian Embassy in Washington DC, 'India Recognizes Bangladesh: Text of Prime Minister's Statement in Parliament' (1972) 11 *International Legal Materials* 119, 121.

36 Moshe Hirsch, *Invitation to the Sociology of International Law* (OUP 2015); Dinah Shelton, 'Editor's Concluding Note: The Role of Non-Binding Norms in the Legal International Legal System' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 554; Martti Koskenniemi, *From*

This study also explores the extent to which the legal underpinnings of self-determination have legalised the use of military assistance as a means of its realisation. In this context, this work examines the Advisory Opinion of the International Court of Justice on *The Unilateral Declaration of Independence in Respect of Kosovo*. The Opinion does not fully clarify the normative content of self-determination or secession. However, it does indirectly imply that the use of force outside of the UN framework, either by other states or by military alliances such as NATO, is a possible way to assist in the realization of self-determination.³⁷ These findings suggest that the right to self-determination within international law is grounded in politics and state interests. Clearly, mobilising powerful states is essential for the successful realisation of self-determination claims.

This study accepts that the strict application of international law is not sufficient to resolve the Kashmir question, but that mobilising political support is imperative to making a just resolution achievable. As such, this study looks at the rather unexplored dimension of the international community's lack of sufficient action regarding the 70-year-old simmering Kashmir conflict, which continues to be in a state of chronic revolt. The book engages in a dialectical analysis, exploring the possibilities of engaging the international community's political will and support for the resolution of the Kashmir crisis. In relation to this, the potential dangers in the region due to the ongoing Kashmir dispute are explored. Such dangers include the accelerating nuclear arms race between India and Pakistan,³⁸ the possibility of the Kashmir dispute becoming hijacked or infiltrated by an Al-Qaeda/ISIS type of terrorism,³⁹ and the continuing widespread human rights violations.⁴⁰ In light of these imminent

Apology to Utopia: The Structure of International Legal Argument (Finnish Lawyers' Publishing Co. 1989) 231; Christopher J Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-determination in the Cases of Kosovo and South Ossetia' (2009–2010) 10 *Chicago Journal of International Law* 1; Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia', (n 33).

37 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)* (2010) ICJ General List No 141, 403.

38 Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (2nd edn, IB Taurus 2003) xiv.

39 Kingsley de Silva, 'Terrorism and Political Agitation in Post-Colonial South Asia: Jammu-Kashmir and Sri Lanka' in Ramesh Thakur and Oddny Wiggen (eds), *South Asia in the World: Problem-Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press 2004) 84, 86.

40 Grace Pelly and Jai Singh, *State Terrorism: Torture, Extra-judicial Killings and Forced Disappearances in India* (Human Rights Law Network 2009) 132; *Kashmir's Torture Trail*,

dangers, this study reviews the possible risks in continuing the old school approach to Kashmir, which emphasises bilateralism and the maintenance of status quo. It also demonstrates how continuing this strategy could endanger international peace and security.

It appears that a peaceful settlement in Kashmir cannot be pieced together out of individual understandings between powerful states.⁴¹ Clearly, the international community, in view of these dangers, cannot decide what the future of Kashmir should be while ignoring ground realities, national aspirations, and the culture of the people. Based on this analysis, this book introduces readers to yet another under-explored dimension in the study of the Kashmir question. It reviews the commitments and declarations of members of the international community that demonstrates their intentions to accept legal obligations at the international level in the form of the UN SCRs and declarations on Kashmir, which, under the concept of estoppel, remain binding on states.⁴² This study will review the extent to which the international community's intentions have conferred a legal obligation on their declarations that there has to be demilitarisation and a subsequent plebiscite in Kashmir.⁴³

Documentary Film by True Vision, 2012 (Producer: Adrian Levy & Cathy Scott-Clark, Director: Jezza Neumann, Executive Producer: Brian Woods) Broadcasted on Channel Four on 10 July 2012; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (26 April) 2013 UN Doc: A/HRC/23/47/Add.1, para 100 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf> accessed 15 December 2016; Staff, 'Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir' (*Human Rights Watch* 11 September 2006) vol 18, no 11(c) <<https://www.hrw.org/report/2006/09/11/everyone-lives-fear/patterns-impunity-jammu-and-kashmir>> accessed 15 October 2016; Staff, 'India: Abuse of the PSA in Jammu and Kashmir' (*Human Rights Watch* 5 April 2000); Amnesty International, AI Index ASA 20/13/00; Staff Report (Dundee), 'Kashmir 1991: Health Consequences of the Civil Unrest and the Police and Military Action' (Physicians for Human Rights (UK), 1991) 13–14; Public Commission on Human Rights, State of Human Rights in Jammu and Kashmir 1990–2005 (Hindustan Printers 2006) 124; S Kak (Director), *Jashn-i-Azadi (Celebrating Freedom)*, Documentary on Kashmir, 2007.

41 WWI Document Archives (n 3); Derek Heater, *National Self-Determination: Woodrow Wilson and His Legacy* (Macmillan 1994) 53; Ryan Griffiths, 'The Future of Self-Determination and Territorial Integrity in the Asian Century' (2014) 27 *The Pacific Review* 458.

42 *Nuclear Tests (New Zealand v France)*, 1CJ 1974, 457 at 472 para 46; Maurice H Mendelson, 'The Subjective Element in Customary International Law' (1995) 66 *British Yearbook of International Law* 177, 180; *Legal Status of Eastern Greenland (Denmark. v Norway)* 1933 PCIJ (series A/B) No 53.

43 *Nuclear Tests (Australia v France)* (Judgment) (1974) 1CJ Reports, 253, 267, para 43; *Nuclear Tests (New Zealand v France)* (Judgment) 1CJ Reports 1974, 457 at 472, para 46.

This study will also review the International Court of Justice's jurisprudence in its 1974 decisions in the *Nuclear Tests* cases,⁴⁴ which affirm that states are barred from changing their previous representations/unilateral declarations when they have already induced reliance. Finally, this study offers a specific solution to the Kashmir question in the form of a proposed Security Council Resolution.

This introductory chapter will explain the research questions; analyse the contextual background of the Kashmir dispute; briefly introduce some central and foundational concepts about the restoration of historical title and the right to self-determination; address the approaches pursued by earlier studies on the Kashmir crisis and identify existing gaps in the literature that the present study endeavours to fill; address some methodological issues; and concisely present the outline of the book by summarising key concepts and identified approaches.

Contextual Background to the Kashmir Question and a Review of the Current Constitutional Position of India, Pakistan, and China on Kashmir

The territory of present-day Kashmir is situated in the northern part of South Asia and the southern part of Central Asia among the Himalayas, and has been described as 'paradise on earth'.⁴⁵ Historically (and as of 1947) the Princely State of Jammu and Kashmir included Jammu, Kashmir, Ladakh, Gilgit, and Baltistan. The heart of the territory is the famous 'Vale of Kashmir', with Jammu province to the south, Ladakh to the east, and Baltistan to the north. Further north are the regions of Hunza and Nagar, and to their west is the Gilgit Agency, which is composed of several political districts.⁴⁶ West of the Vale are the districts of Muzaffarabad, Riasi, Poonch, and Mirpur.⁴⁷ All these regions of Kashmir were under Dogra rule (1846–1947) and British Paramountcy. Kashmir, now with a population of over 12.5 million, had a population of just

44 *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Rep, 253, 267, para 43; *Nuclear Tests (New Zealand v France)*, Judgment, ICJ. Reports 1974, 457 at 472, para 46.

45 R Wright and D McManus, 'Unconventional and Indiscriminate: The Changing Faces of War' *LA Times* (Los Angeles, 18 December 1990) H5.

46 CU Aitchison, *A Collection of Treaties, Engagements and Sanads- Relating to India and Neighbouring Countries- North West Frontier Province, Baluchistan, Jammu & Kashmir, Eastern Turkistan and Afghanistan* Vol. XI, (Superintendent Government Printing 1909) 256.

47 Josef Korbel, *Danger in Kashmir* (Princeton University Press 1954) 5.

four million in 1947,⁴⁸ 80 percent of whom were Muslim. The non-Muslim population included Hindus, Sikhs, and Buddhists. The language of the plains is Kashmiri, which belongs to the Indo-European family of languages⁴⁹ and is distinct from the Sanskritic main language of India, Hindi, as well as Urdu.⁵⁰ Despite the multiple languages spoken in the region, the people of Kashmir have retained a strong attachment to their cultural identity of *Kashmiriyat*, which transcends their diversity in language and religion.⁵¹

This land is cradled by the world's second tallest peak, K2 (or Mt. Godwin Austen), which is over 28,000 feet high, and *Nanga Parbat*, which is in the Astore District of Northern Kashmir. Kashmir has as many as twenty passes,⁵² including the *Broghil*, *Darkot*, *Thui-An*, *Chumar Khan*, *Shandur*, *Dadarilli*, *Babusar*, *Mintaka*, *Khunjerab*, *Aghil*, *Korakoram*, *Banihal*, *Zoji La* and the *Haji Pir* Passes.⁵³ Kashmir also has international borders with China, Tajikistan (formerly part of the Soviet Union), Afghanistan, India, and Pakistan.⁵⁴ This critical location was always strategically significant for the ruler controlling it. For example, Kashmir formed a defensive outpost against the Russian Empire during the British Raj.⁵⁵

In 1773, the British East India Company's activities in India came under the direct control of the British Parliament.⁵⁶ In 1833, the Charter Act was passed and the Company assumed the functions of the Government of India (GOI). British India was managed by the imperial government in London through the Secretary of State for India and by the Viceroy, who was the head of the GOI. It was comprised of seven major provinces which were administered either by a Governor or a Lieutenant-Governor.

48 Richard Edmund Ward, *India's Pro-Arab Policy: A Study in Continuity* (Greenwood Publishing Group 1992) 73.

49 GA Grierson, *Linguistic Survey of India-Specimens of the Dardic or Pisacha Languages (Including Kashmiri)* (Superintendent Government Printing 1919) vol VIII, pt II.

50 *ibid* 2.

51 Salman Rushdie, *Shalimar the Clown* (Random House 2005) 57.

52 Schofield, (n 38) 1.

53 UN Map of the Area <<http://www.un.org/Depts/Cartographic/map/dpko/unmogip.pdf>> accessed 10 January 2008.

54 Ward, (n 48) 73.

55 John T McNay, *Acheson & Empire: The British Accent in American Foreign Policy* (University of Missouri Press 2001) 109; Peter Hopkirk, *The Great Game: The Struggle for Empire in Central Asia* (Kodansha International 1994).

56 Regulating Act of 1773 was replaced by Second Regulating Act called Pitts's India Act of 1784.

The expansionist policies of Lord Dalhousie created uproar in the region because of his confrontational policy against Princes, which had become an expensive adventure for Britain. After the mutiny of 1857, the remaining powers of the East India Company were transferred to the Crown.⁵⁷ The expansionist attitude towards the Princely States officially came to a halt after Queen Victoria's Proclamation of 1858, which stated: 'We desire no extension of our present territorial possessions...we shall respect the rights, dignity and honour of native princes as our own'.⁵⁸ This left 584 Princely States scattered across British India.⁵⁹ The rest of the territory was ruled directly by the British Crown as a colony of the United Kingdom.⁶⁰ Hence, India consisted of regions referred to as British India, which were directly administered by the British, and other regions, the Princely States,⁶¹ which were governed by different leaders.

Letting the Princely States survive allowed the British to save on the internal administration and security of these States, and permitted them to rule at arm's length. The Princes were allowed a measure of internal autonomy in exchange for accepting British paramountcy. The Princely States were broadly divided into three categories, and the one that Kashmir belonged to consisted of 108 States and had rulers in the Chamber of Princes. They enjoyed complete legislative and administrative independence within their own borders, with their laws being supreme and with no appeal from their courts—even to the Privy Council. Kashmir – as a Himalayan Princely State – was territorially isolated from British India but was strategically significant as it bordered Afghanistan, Russia/the Soviet Union, and China.

However, despite this apparently peaceable settlement, history shows that the status of the Princely States became a source of conflict during decolonisation. At the time of decolonisation, Kashmir became independent under the

57 Imperial Gazetteer of India, *The Indian Empire*, vol IV, *Administrative* (new edn, Clarendon Press 1907) 5.

58 VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans 1961) 9.

59 LH Miller, 'The Kashmir Dispute' in L. Scheinman and D. Wilkinson (eds), *International law & Political Crisis- An Analytic Casebook* (Little Brown and Company 1968) 42. There is some controversy as to the number of Princely States, the *Imperial Gazetteer of India* listed 693 States including the Shan States in Burma as well as Nepal, but the Report of the Indian States Committee in 1929 reduced the number to 562. See, Imperial Gazetteer of India, *The Indian Empire*, vol 4, *Administrative*, (new edn, Clarendon Press 1907) 92–103; East India (Indian States), *Report of the Indian States Committee 1928–1929* (London 1929) 10–11.

60 Imperial Gazetteer of India, *The Indian Empire*, vol 11, *Historical* (new edn, Clarendon Press 1909) 514–30.

61 Imperial Gazetteer of India, (n 57) 58–103.

provisions of the Indian Independence Act 1947, Section 7, as it did not join either of the new dominions of India and Pakistan. In 1947, civil war broke out in Kashmir against Maharaja Hari Singh. In the midst of that confusion, the Maharaja signed the Instrument of Accession (IOA) with India, which is described as having been concluded under duress and was, in any case, conditional to plebiscite. Internationally, it has always been accepted that the IOA is a disputed and potentially illegitimate agreement.⁶² The Indian army marched into Kashmir, and a war between India and Pakistan followed (1947–48), resulting in the occupation and division of the territory of Kashmir between them into Indian and Pakistani Occupied Kashmir.

The former Princely State of Jammu and Kashmir (J&K) is currently divided between India, Pakistan, and China. India controls Kashmir, Jammu, and Ladakh. India has also integrated J&K into its Union through the Article 1⁶³ and 370⁶⁴ of the Constitution of India, 1950. The First Schedule of the Constitution of India defines the territory of J&K as ‘the territory which immediately before the commencement of the Constitution was comprised in the Indian State of Jammu and Kashmir’.⁶⁵ Article 370 is a temporary provision in the Indian Constitution giving Kashmir a special status. Article 370 and the Delhi Agreement 1952 provided autonomy to Kashmir. However, India passed the Constitutional (Application to Jammu & Kashmir) Order 1954, Kashmir Accord 1975, and other unlawful provisions to transport Indian laws to integrate Kashmir fully into its Union without the consent of the people. India repealed the original constitution of Kashmir, the Jammu and Kashmir Constitution Act 1939, and replaced it with the new Constitution of Jammu and Kashmir 1957. It is important to note that India regards the entirety of the Princely State of Kashmir as an integral part of India, one that the Maharaja allegedly ceded to India in 1947,⁶⁶ and that is the position both within India’s constitution and the new constitution of Kashmir. India’s constitution considers the children born in IOK after 1950 its citizens. In Chapter 4, there is a detailed discussion

62 FO 371/129772: DY1041/181: Record of a Conversation between the Secretary of State and Krishna Menon on 2 March 1957.

63 Article 1 (3) of the Indian Constitution 1950, ‘the territory of India shall comprise of – (a) the territories of the States...such other territories as may be acquired’.

64 Khan, (n 15) 29.

65 Adarsh Sein Anand, *The Constitution of Jammu and Kashmir- Its Development & Comments* (4th edn.; Universal Law Publishing Co. Pvt Ltd 2004) 183.

66 Article 4 of the Constitution of Jammu and Kashmir, 1957, ‘*The territory of the State (Kashmir) shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State.*’

on the validity of the new constitution and other laws that have been imposed in contravention of the IOA.

At present, Pakistan occupies Northern Kashmir (Gilgit and Baltistan) through the Northern Areas Council, and Azad Kashmir (Muzaffarabad, Riasi and Mirpur), which was part of Kashmir in 1947 (hereinafter Pakistan Occupied Kashmir, POK) through the Karachi Agreement of April 28th 1949. The people in the Gilgit-Baltistan area are in a state of flux and they believe that their political future is linked with J&K State.⁶⁷ In terms of its constitutional framework, Pakistan has declared that no part of the territory of Kashmir belongs to it, including the areas under its administration. However, it also does not consider those areas as belonging to India. This is partly due to the fact that Pakistan considers the accession of Kashmir to India invalid because of the lack of proper consultation with the Kashmiri people.⁶⁸ Indeed, Article 257 of Constitution of Pakistan 1973 declares that the future of the entire State of J&K should be determined in accordance with the wishes of the people.⁶⁹ Kashmiri people in Pakistan are furthermore not considered citizens of Pakistan.⁷⁰ Their status in Pakistan is as 'citizens of the former State of J&K but Domiciled in Pakistan'.⁷¹

Having said this, although areas of Kashmir under Pakistani occupation or control (POK) are not the focus of this study for the four reasons detailed above, it is important to note that the people in these areas face significant challenges. The first of these challenges include election-rigging, particularly in 2016.⁷² Despite the claim of an *azad* (free) government, election-rigging and

67 In this regard Balawaristan National Front, a political party was formed on July 30th 1992, which put forth the illegal occupation of the area at the hands of Pakistan. See <<http://www.outlookindia.com/website/story/treated-by-pakistan-as-virtual-slaves/216236>> accessed on March 24th, 2017.

68 Fakiha Khan, 'Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute' (2000–2001) 29 Georgia Journal of International and Comparative Law 361, 373.

69 Article 257, Provision Relating to the State of Jammu and Kashmir reads as: '*When the people of State of Jammu and Kashmir decide to accede to Pakistan, the relationship between that State shall be determined in accordance of the wishes of the State*' <<http://www.pakistani.org/pakistan/constitution/part12.ch4.html>> accessed 28 February 2017.

70 FCO 37/914: Letter from British High Commission, Giles Bullard, Islamabad to H.C. Byatt, South Asian Department, FCO London, 25 January 1971 [NAL].

71 DO 35/10388: Letter from Commonwealth Office 18 July 1958 to Mr. Fowler High Commissioner in Karachi [NAL].

72 Sarla Handoo, 'Elections in POK – a farce' (*The Kashmir Herald*, undated) <<http://www.kashmirherald.com/main.php?t=OP&st=D&no=163>> accessed 28 February 2017; Jacob Steiner, 'The Untold Story of the People of Azad Kashmir by Christopher Snedden:

electoral fraud is the norm in POK.⁷³ The civilian government follows dictates of the government in Islamabad, the legislative assembly creates laws in line with Pakistani officials, and the Election Commission is comprised of members acceptable to Pakistani authorities.⁷⁴ This is compounded by the fact that 3 of the 4 major political parties in POK are extensions of Pakistan-based parties. Political groups calling for the independence of Kashmir are also forbidden from partaking in elections under the 1974 constitution imposed by Pakistan.⁷⁵ The Jammu and Kashmir Liberation Front (JKLF), for example, having been founded before Partition to rally for the independent state of Jammu and Kashmir, was destroyed by the Pakistani military thereafter.⁷⁶

Human rights violations are also rampant.⁷⁷ Torture is routinely conducted by Pakistani military and intelligence personnel.⁷⁸ Kashmiri refugees and former militants from IOK are regularly surveilled, harassed, arrested, and beaten (sometimes even to death). Freedom of expression is severely curtailed, and this includes media restrictions and the banning of independence-related publications.⁷⁹ Furthermore, there is no accountability for the forced disappearances of thousands of people, including Pakistani army personnel and suspected spies.⁸⁰ The cumulative effect of such human rights abuses have led to a fundamentally mal-administered *Azad* Kashmir by Pakistan, fuelling the people in these parts of Kashmir to fight for their independence from Pakistan. The final major challenge in POK is terrorism. While groups (extremist or otherwise) that support the independence of Kashmir are persecuted,

a Review' (Dawn, 4 August 2013) <<https://www.dawn.com/news/1033395>> accessed 28 February 2017.

73 Aili Piano, *Freedom in the World 2009: The Annual Survey of Political Rights and Civil Liberties*. (Rowman & Littlefield 2009) 860; 'Pakistan: Abuses Feared in Kashmir Elections'. (Human Rights Watch, 7 July 2006) <<https://www.hrw.org/news/2006/07/07/pakistan-abuses-feared-kashmir-elections>> accessed 19 March 2017.

74 Shamil Shams, 'How free is Pakistan-administered Kashmir?' (DW Made for Minds, 21 July 2016) <<http://www.dw.com/en/how-free-is-pakistan-administered-kashmir/a-19416247/>> accessed 19 March 2017.

75 Christophe Jaffrelot, *Pakistan: Nationalism without a Nation*, (Zed Books 2002) 296.

76 Gaurav Bhatnagar, 'The Islamicization of Politics: Motivations for Violence in Kashmir' (2009) 20 (1) *The Journal of Politics and Society* 1–20.

77 Brad Adams, 'Pakistan: "Free Kashmir" Far From Free' (Human Rights Watch, 21 September 2006) <<https://www.hrw.org/news/2006/09/21/pakistan-free-kashmir-far-free/>> accessed 19 March 2017.

78 Human Rights Watch, 'With Friends Like These...! Human Rights Violations in Azad Kashmir'. Human Rights Watch (2006) Volume 18, No.12(C) 54.

79 *Human Rights Watch World Report 2007* (Seven Stories Press, 2007) 306.

80 Asian Legal Resource Centre, 'Pakistan: Thousands Of Persons Remain Missing' (Scoop, 27 August 2010) <<http://www.scoop.co.nz/stories/WO1008/S00470/pakistan-thousands-of-persons-remain-missing.htm>> accessed 19 March 2017.

those targeting Indian-administered Kashmir and calling for the integration of J&K into Pakistan are often funded and trained by Pakistani authorities.⁸¹ It is believed that many terrorist organisations like Lashkar-e-Taiba (founded by Hafiz Saeed and well known as being responsible for the 2008 Mumbai terror attacks) are based in POK and receive support from Pakistan's Inter-Service Intelligence spy agency.⁸²

Kashmir was further divided after the 1962 war between India and China, as the latter occupied 38,000 square kilometres (14,670 sq miles) in the northern part of Ladakh called Aksai Chin,⁸³ which was under Indian Occupation. Aksai Chin is administered as part of the *Hotna* Prefecture in the Xinjiang Autonomous Region (XAR).⁸⁴ China has also occupied 5,180 sq km (2,000 sq miles) of northern Kashmir called the Trans-Karakoram Tract, which Pakistan ceded to Beijing in 1963.⁸⁵ Pakistan ceded the territory through the Sino-Pakistan Frontier Agreement 1963. Article VI of this agreement affirms that after the settlement of the Kashmir dispute, the sovereign authority in Kashmir will reopen negotiations with China on this boundary. This treaty is a temporary arrangement and when the final settlement of the Kashmir dispute reopens negotiations under Article VI, a formal boundary treaty could replace this provisional agreement.⁸⁶

The territory ceded to China creates links to the remote provinces of Tibet and Xinjiang. China has built the Karakoram Highway as part of a strategic connection to Pakistan.⁸⁷ China has also built the Xinjiang-Tibet national highway that crosses Aksai Chin.⁸⁸ This is a strategic location for overseeing trade and transit between Tibet, Ladakh and East Turkestan.⁸⁹ For China, the Western sector border dispute over Aksai Chin with India is settled and considered a 'closed chapter'.⁹⁰

81 Khan, (n 68) 388.

82 Hassan Abbas, 'Pakistan through the Lens of the Triple A Theory' (2006) 30 (1) Fletcher Forum of World Affairs 181, 182.

83 Byron N Tzou, *China and International law: the Boundary Dispute* (Praeger Publisher 1990) 60.

84 Nick Easen, 'Aksai Chin: China's disputed slice of Kashmir', *CNN*, 24 May 2002.

85 *ibid.*

86 Mohan Ram, *Politics of Sino-Indian Confrontation* (Vikas Publishing House Pvt Ltd 1973) 4.

87 Ali Khan, 'The Kashmir Dispute: A Plan for Regional Cooperation' (1994) 31 Columbia Journal of Transnational Law, 495, 512.

88 Ananth Krishnan, 'China spruces up highway through Aksai Chin' *The Hindu* (Chennai, 11 July 2012) <<http://www.thehindu.com/news/international/china-spruces-up-highway-through-aksai-chin/article3628525.ece>> accessed 11 March 2017.

89 Senge H Sering, 'China Builds Dam on Indus near Ladakh' (2010) 4 Journal of Defence Studies 136.

90 Ananth Krishnan, 'Month after border talks, Chinese paper says Aksai Chin is a closed chapter', *The Hindu* (Chennai, February 16, 2012) <<http://www.thehindu.com/news/inter>

At this point it is significant to mention that apart from the Western Sector (Karakoram tract, Aksai Chin) border dispute between China and India, Sino-Indian relations have also been marred by various other border conflicts,⁹¹ namely in the Middle (*Spiti Area, Shipki Pass* etc 625km long) and Eastern (Arunachal Pradesh, McMahon Line and *Tawang Area*, 65000 sq km) Sectors.⁹² The two governments have not mutually accepted these borders, and attempts at formal demarcations are contentious. These disputed areas, along with Aksai Chin, are strategically important as they border other countries: Afghanistan, Pakistan, Bhutan, and Nepal. The effect of such pending disputes between India and China on the Kashmir dispute will be discussed in Chapter 6. As far as Aksai Chin and the Karakoram tract is concerned, the Constitution of the People's Republic of China 1982 does not seem to refer to the former Princely State of Jammu and Kashmir as a whole or even to the part of its territory under Chinese occupation.⁹³ The territory of Kashmir under China is also largely uninhabited, which most likely makes it a border dispute that could be resolved with the future sovereign of Kashmir.

After the 1947 war, Kashmir ceased to exist as a *de facto* state and the people found themselves wedged in the political and ideological conflict between India and Pakistan. The escalations in India-Pakistan tensions have consistently caused problems for the Kashmiri people in their claims for independence. In 1947, Randolph Holmes wrote:

It seems the only solution is for England to take up her responsibilities, come in as custodian for Kashmir and give peace to both India and Pakistan. Kashmir cannot be a vacuum in power politics, with Russia and China restive on the Himalayan rampart.⁹⁴

national/month-after-border-talks-chinese-paper-says-aksai-chin-is-a-closed-chapter/article2897629.ece> accessed 11 March 2017.

- 91 Junwa Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Martinus Nijhoff Publishers 2009) 191.
- 92 Alastair Lamb, *The China-India Border: The Origins of the Disputed Boundaries* (OUP 1964) 9; X. Lui, *The Sino-Indian Border Dispute and Sino-Indian Relations* (University of American Press 1994) 1–2; Dorothy Woodman, *Himalayan Frontiers: A Political Review of British, Chinese, Indian and Russian Rivalries* (Praeger 1969).
- 93 People's Republic of China 1982, adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on 4 December 1982 <<http://www.hkhrm.org.hk/english/law/const01.html>> accessed 22 September 2008.
- 94 IOR: Mss Eur F265/18 'Khyber Frontiers in Turmoil' by Randolph Holmes 129 (1947–48).

In 1948, India lodged a complaint against Pakistan under Chapter VI of the UN Charter (1945) for aggression in Kashmir.⁹⁵ Pakistan challenged the legality of Kashmir's accession to India.⁹⁶ After much deliberation and over a relatively short period, the Security Council passed twenty resolutions⁹⁷ on Kashmir. Some of these SCRs directed India and Pakistan to demilitarise the territory of Kashmir and conduct a plebiscite so that the people could decide the status of their territory.⁹⁸ However, both India and (to a lesser extent) Pakistan have attached so many reservations to the acceptance of certain key resolutions and recommendations from UN bodies that it has been seen as tantamount to rejection.⁹⁹

The American position on Kashmir was made clear in a statement made by US Assistant Secretary of State for South Asia, Robin Lynn Raphael, in October 1993 in reply to a question asked at a press gathering. She stated, 'We view Kashmir as disputed territory and that means we do not recognise that Instrument of Accession as meaning that Kashmir is forevermore an integral part of India'.¹⁰⁰ It appeared that there was a political consensus among the Permanent SC Members, who agreed to the terms of all SCRs calling for demilitarisation and a plebiscite. The question of whether such support was for the self-determination of Kashmir or simply to support Pakistani claims for geopolitical reasons shall also be discussed in this study.

The government of India initially agreed to conduct a plebiscite, however it changed its mind during late 1950s.¹⁰¹ On the other hand, Pakistan continues to support conducting a plebiscite.¹⁰² India ignored the SCRs mandating it to take

95 Letter from the Representative of India to the President of the SC (1 Jan, 1948), UN Doc S/628 (1948), Annex 28, 139.

96 Letter from the Minister for Foreign Affairs of Pakistan to the Secretary General (15 Jan 1948), UN Doc S/646 & Corr. 1 (1948), Annex 6, 67.

97 UNSCR 38 (17 January 1948); 39 (20 January 1948); 47 (21 April 1948); 51 (3 June 1948); 80 (14 March 1950); 91 (30 March 1951); 96 (10 November 1951); 98 (23 December 1952); 122 (24 January 1957); 123 (21 February 1957); 126 (2 December 1957); UNCIP SCR (13 August 1948); UNCIP SCR 5 (January 1949); UNSCR 209 (4 September 1965); 210 (6 September 1965); 211 (20 September 1965); 214 (27 September 1965); 215 (5 November 1965); 303 (6 December 1971) and 307 (21 December 1971).

98 UNSCR 47 (21 April 1948).

99 Korbelt, (n 47) 112, 139, 145.

100 Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* (rev edn, US Institute of Peace Press 1997) 48.

101 Statement by the PM of India, Jawaharlal Nehru, 2 October 1947, in KS Husan (ed), *Documents On The Foreign Relations of Pakistan: The Kashmir Question* (Institute of international affairs 1966) 74.

102 Statement of Governor General of Pakistan, Jinnah in G. Rao, *Legal Aspects of the Kashmir Problem* (Asia Publishing House 1967) 337.

the wishes of the Kashmiri people into account and constitutionally incorporated all of the former Princely State of Kashmir into its Union and installed the Nominated Government in 10K.

The international community does not recognise the legality of the Indian incorporation of Kashmir.¹⁰³ India has consistently ignored the right of the Kashmiri people to determine the future of their territory. In 1989,¹⁰⁴ a violent insurgency erupted in 10K claiming *azadi* (independence) from the Indian occupation. India has deployed over 700,000 troops¹⁰⁵ to crush the self-determination claims¹⁰⁶ and nationalism of Kashmiris. This has worsened the human rights situation in Kashmir due to the horrific violence and the use of draconian laws¹⁰⁷ such as the Jammu and Kashmir Armed Forces (Special Powers) Act 1990 (AFSPA) and the Jammu and Kashmir Public Safety Act 1978 (JKPSA) etc. These have taken away basic safeguards and entrenched political control over prosecutions, making it virtually impossible to seek redress even if it is technically available. Such laws were introduced despite the 44th Amendment to the Constitution of India, which ruled out the government's right to suspend the writ of *Habeas Corpus* and the rights to life and due process.¹⁰⁸

The situation in Kashmir has worsened since 2014, when the BJP came to power in India.¹⁰⁹ The BJP has a reputation of being a fundamentalist Hindu nationalist party whose agenda is to prioritise Hindus and denigrate other religious groups. Their rhetoric stirs up violence against groups that are 'other', despite India being a multi-religious and multi-ethnic country. Their radical views are evident from the way they force Hindu rituals and beliefs on Muslim and Christian minorities (such as the absurd beef ban) which has led to vigilante murders of minorities.¹¹⁰

103 UNSCR 91 (30 March 1951); UNSCR 122 (24 January 1957).

104 Tim McGirk, 'The Vicious Little War in India's Camelot' *Independent* (London, 17 September 1991) 7.

105 I Anjum, 'SAARC with Special Reference to Indo-Pakistan Trade Potential' (1997) 3(2) *International Trade Law & Regulation* 42–45, 42.

106 Tim McGirk, 'The Vicious Little War in India's Camelot', *Independent* (London, 17 September 1991) 7.

107 The Jammu & Kashmir Disturbed Areas Act, 1992.

108 Ashok Agrwaal, *In Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990 – 2004* (SAFHR Paper Series 17, Kathmandu 2008).

109 Staff, 'India Elections 2014' *The Guardian* (London, 16 May 2014) <<https://www.theguardian.com/world/2014/may/16/india-election-2014-results-live>> accessed 2 December 2016.

110 Indrani Basu, 'Six Outrageous Things BJP Leaders Have Said About Dadri Murder Over Beef' *Huffington Post* (New York, 6 October 2015) <<http://www.huffingtonpost.in/2015/10/01/six-outrageous-things-bjp-leaders-have-said-about-dadri-murder-o/>> accessed 2 December 2016.

Over the years the international community, both collectively and through individual member states, has adopted policy practices that are not in consonance with their legal position. Foreign policy that maintains the *status quo* and promotes bilateralism became trendy after the conclusion of the Simla Agreement between India and Pakistan in 1971. The full discussion on the Simla Agreement is in Chapter 6.¹¹¹ However, it should be mentioned here that if there is a conflict between domestic law and UN Charter principles, the latter prevails under Article 103 of the United Nations Charter (1945). In 1998, India and Pakistan stunned the world when they tested their nuclear weapons. These nations have been at war many times starting in 1947, and again in 1965, 1971, and 1999, with conflicts still ongoing. They also came close to igniting a nuclear war in 2001–2002.¹¹² The UN Secretary General, Kofi Annan, expressed his hope ‘to move beyond crisis management to real solutions on Kashmir’.¹¹³ It appears that a more active and involved role should be adopted by the international community again to both fulfil their legal obligations and to resolve a crisis that could lead to more political and humanitarian catastrophes.

Foundational Concepts and Issues: The Restoration of Historical Title and the Right to Self-determination

The principles underlying the restoration of historical title debate can be illustrated through a classic fairy tale, the story of *Sleeping Beauty*.¹¹⁴ In the story, the curse of a wicked fairy is triggered when the princess pricks her finger on a spindle, and she falls into a deep sleep for a hundred years. Everything is preserved over that time, and reawakens when the curse is broken. This study shows that the curse of illegal occupation does not end the *de jure* existence of an occupied state. Therefore, occupied people can restore their historical title and their entitlement to their illegally occupied territory.

Historically, the right or title to occupied territory transferred from its previous sovereign to an enemy occupier, along with the reinstatement of all persons

¹¹¹ See, Chapter 6, Section 6.5.2.

¹¹² Kevin M Brew, ‘The Re-Emergence of Nuclear Weapons as “The Coin of the Realm” and the Return of Nuclear Brinkmanship in South Asia: The Nuclear Sword of Damocles still Hangs by a Thread’ (2005) *Naval Law Review* 177, 184.

¹¹³ ‘Indo-Pak Tension Major Threat to World Peace: Annan’ *Hindustan Times* (New Delhi, 12 September 2002); ‘Bush, Annan Holds Talks on Kashmir Issue’ *AFP Dispatch* (New York, 13 September 2002).

¹¹⁴ To explain the principle of restoration of historical title of the Baltic States, Mälksoo has used a story of *Snow White* (*Schneewittchen*) and Oliver Dörr has used Jewish legend of Golem. See Mälksoo (n 2) xxv.

and things, occurred through a peace treaty or otherwise.¹¹⁵ However, with the development of international law and the understanding of 'unjust war',¹¹⁶ forceful occupation is not recognised as a legitimate method of acquiring title to a territory.¹¹⁷ Hence, states cannot acquire legal title to any territory through the use of force.¹¹⁸ Military occupation therefore ends with the restoration of the legitimate sovereign powers of the occupied state.¹¹⁹

In the post-WWII era, the illegal use of force has been denounced and the prohibition of aggression is legally well-supported.¹²⁰ Claims that involve the restoration of title have historical origins and the right to reclaim territory is rooted in remedying violations of territorial sovereignty.¹²¹ The re-establishment of independence is based on the historical continuity of statehood, which is accepted to have not ceased to exist *de jure* throughout the illegal occupation.¹²² Legally speaking, the fundamental principle of *ex injuria non oritur jus* (no legal benefit can be derived from an illegal act) keeps *de jure* title preserved despite occupation.¹²³ The exercise of restoring historical title leads to independence, which is exercised through the right to external self-determination.

In the post-colonial era, the restoration of historical title in the Baltic States (Estonia, Latvia and Lithuania) was well received by the international community. On 2 September 1991, President George Bush stated that the United States had always recognised the independence of those countries, and that it had

115 Henry Wheaton, *Elements of International Law: with a Sketch of the History of the Science* (London 1836) 288.

116 For more on wars see, Michael Walzer, *Just and Unjust Wars- A Moral Argument with Historical Illustrations* (3rd edn, Basic Books 2000).

117 Thomas D Grant, 'A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law' (1999) 40 *Virginia Journal of International Law* 115, 166.

118 Article 17 of the Organisation of American States (OAS), Charter of the Organization of American States (30 April 1948) and UNSC Res 242 (1967) SCOR 22nd Session, 1382 mtg, UN Doc S/8247.

119 Arnold Duncan McNair, *Legal Effects of War* (2nd edn, CUP 1944) 318–20.

120 Article 2(4) of the UN Charter 1945, UNGA Res 1514 (XV) (14 December 1960); 2131(XX) UN-GAOR, 20th Sess. Supp. No. 14 UN Doc (A/6014) 11 (21 December 1965); Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right Peoples to Self-Determination, UNGA Res 2160 (XXI) (30 November 1966); Definition of Aggression, UNGA Res. 3314 (XXIX) (14 December 1974); Preamble of Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into Force 27 January 1980) 1155 UNTS 331.

121 Brilmayer, (n 2) 58–85, 69.

122 Jaan Salulaid, 'Estonia – Restoration of the Effect of Estonian International Treaties' (2001) 1 *Baltic Yearbook of International Law* 225, 225.

123 Peter Van Elsuwege, 'State Continuity and its Consequences: The Case of the Baltic States' (2003) 16 *Leiden Journal of International Law* 377, 377.

never recognised the ‘forcible incorporation of the Baltic States by the [Soviet Union]’.¹²⁴ In fact, the Baltic States had maintained diplomatic missions in the United States.¹²⁵ The Baltic States became independent after the First World War and were recognised by the Treaty of Versailles.¹²⁶ In 1940, they were occupied by the Soviet Union as a result of a secret Nazi-Soviet agreement, the infamous Molotov-Ribbentrop Pact of 1939.¹²⁷ These states remained occupied for five decades until the breakdown of the Soviet Union and later seized the opportunity to declare their independence (March-May 1990).¹²⁸ In August 1991 after they officially declared the reinstatement of their independence, they did not regard themselves as successor states of the Soviet Union¹²⁹ but rather claimed state continuity¹³⁰ and an end to unjust annexation.¹³¹ While the declarations of independence were considered by the Soviet Union to be secession,¹³² the Baltic States claim that they existed as *de jure* entities despite Soviet *de facto* control over them, as the Soviet occupation was illegal and was not recognised as legitimate by the west.¹³³

The concept of restoring historical title is linked to other key concepts, such as statehood, state extinction, state identity, state continuity, and state recognition, among others. Reinstating nations that were *de facto* extinct raises questions about their existence that need further analysis. For example, what is the legal basis on which state identity/continuity is recognised? What is the legal explanation for the survival of states? Can states resurface after their extinction? Can states claim immortality? Could legal continuity really restore a state to its original condition (*restitutio ad integrum*) or is that an unworkable legal fiction?¹³⁴ Upon *de facto* extinction, do states die or are they awaiting resurrection? These questions will be extensively discussed in Chapter 3. At this point it is sufficient to point out that the non-recognition of illegal

124 Mälksoo, (n 2) 53.

125 Allison, (n 28) 630.

126 *ibid* 625.

127 Dagmara Vallens, ‘The Law on Aliens Controversy in the Baltic States’ (1995) 54 *International Commission of Jurists Review* 1, 2; *ibid* 625.

128 Vallens, (n 127) 3.

129 Smith, (n 28) 136.

130 Van Elsuwege, (n 123) 377.

131 Thomas W Simon, ‘Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo’ (2011–2012) 40 *Georgia Journal of International and Comparative Law* 105, 117.

132 Mälksoo, (n 2) 46.

133 Cassese, (n 1) 260; David Kirby, ‘Incorporation: The Molotov-Ribbentrop Pact’ in Graham Smith (ed), *The Baltic States: The National Self-Determination of Estonia, Latvia and Lithuania* (St Martin’s Press 1994) 72.

134 Van Elsuwege, (n 123) 381, 387.

occupation¹³⁵ and the recognition of the independence of annexed states are significant for restoration of historical title.¹³⁶

The former Soviet President, Boris Yeltsin, recognised the independence of the Baltic States and thereby virtually sealed their success as independent states.¹³⁷ The recognition of those states denotes the political will of the international community and welcomes previously annexed states to the family of sovereign states. There was some historical precedent for this. For example, during WWII Poland became the victim of the Nazi and the Soviet aggression, resulting in its partition for a second time under the secret Molotov-Ribbentrop Pact of 1939.¹³⁸ Poland was re-constituted after WWII and was recognised by the international community as a state.

In the post-colonial era, these events – particularly the recognition of the ‘sameness’ of the Baltic States 51 years after their *de facto* disappearance – became strong precedents in international relations.¹³⁹ It appears that the loss of territory due to occupation does not mandate the loss of statehood. The application of the restoration of historical title to the Princely State of Kashmir is critically analysed in Chapter 4 of this book. The chapter discusses the idea of whether after 70 years, the continued legal existence of the illegally annexed and *de facto* extinguished state of Kashmir could be established.

Chapter 3 also elaborates on the concepts of nationalism and political sovereignty and their relationship. Nationalism is strengthened by a nation having historical title to the territory they are claiming.¹⁴⁰ It is precisely for this reason that the nationalist movements claiming independence seek to establish political sovereignty, which entitles them to the right to exercise self-determination.¹⁴¹ In claims that involve the restoration of historical title, illegal occupation can be remedied by the international community’s recognition of the original political sovereignty of people of the annexed territory. Brilmayer emphasises that in Kashmir, like in the former Yugoslavia, nationalists are

135 Benvenisti, (n 26) 149.

136 Vallens, (n 127) 3; Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Libr. Droz 1968) 329.

137 Lee H Hamilton, ‘Soviet Changes – The Implications’ *Christian Science Monitor* (Boston, 4 September 1991) 19; Henry Kamm, ‘Yeltsin, Repaying a Favour, Formally Recognizes Estonian and Latvian Independence’ *N.Y. Times* (25 August 1991) 17.

138 Daniel H Cole, ‘Symposium on the Constitution of the Republic of Poland – Part II’ (1998) *Saint Louis-Warsaw Transatlantic Law Journal* 1, 24.

139 Mälksöo, (n 2) xxv.

140 Brilmayer, (n 2) 67.

141 Lea Brilmayer, ‘Secession and Self-Determination: A Territorial Interpretation’ (1991) 16 *Yale Journal of International Law* 177, 201.

fighting to gain political control over the territory that (in their view) has been wrongfully seized.¹⁴² The restoration of historical title as a principle relies on the fact that the annexed territory was under a sovereign state prior to its occupation.

Under international law, the existence of a defined territory is a precondition for statehood. Statehood is closely related to recognition, but there is a clear distinction between the objective criteria for statehood and the effect of subjective recognition.¹⁴³ Some argue that recognition from other states is not an entirely decisive matter while others say, conversely, that recognition is the constitutive element of statehood and that a state cannot exist without it.¹⁴⁴ In any case, the political reality of recognition ensures continuing statehood.¹⁴⁵ Hence, even if international law were to fail to protect statehood international relations could achieve this result by ensuring continued recognition.¹⁴⁶

However, a discussion concerning statehood is problematic in the context of third world entities that were not considered to possess sovereignty during colonial times,¹⁴⁷ which was a way of legitimising their suppression.¹⁴⁸ This is even more challenging in the case of the Princely State of Kashmir. To address this issue, Chapter 3 reviews the concept of protected states, colonial protectorates, vassal states, and suzerainty, which is important in discussing the issue of the Indian Princely States as they were before 1947.¹⁴⁹ The discussions relating to the philosophical conceptualisations of statehood (objective and subjective) in Chapter 3 suggest that historical states were sovereign according to their own terms and civilisational values. In the 2016 *South China Sea Arbitration*, the Permanent Court of Arbitration reviewed the distinction between historical title and private rights.¹⁵⁰ The tribunal agreed that historical rights

142 Brilmayer, (n 2) 68.

143 Talmon, (n 22) 33–43; Crawford, (n 22) 25–28; Brownlie, (n 22) 197, 197.

144 Antonowicz, (n 23).

145 Jain, (n 23).

146 *ibid* 51.

147 See generally, Koskenniemi, (n 36).

148 Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) 2 *Chinese Journal of International Law* 77, 85; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005); James Gathii, 'Imperialism, Colonialism, and International Law' (2007) 54 *Buffalo Law Review* 1013; Koskenniemi, (n 36) Ch. 4.

149 Crawford, (n 22) 287, 321; Wallwyn P Shephard, 'Suzerainty' (1899) 1 *Journal of the Society of Comparative Legislation* 432.

150 *The South China Sea Arbitration (The Republic of Philippines v The People's Republic of China)* (12 July 2016) PCA Case No 2012–19, 312, para 798.

may include sovereignty and cannot be illegally displaced.¹⁵¹ This contemporary jurisprudence has a significant influence on ideas relating to the statehood of Kashmir.

The debate on the right to self-determination in this book suggests that this right is the cornerstone of international society under the Charter of the United Nations and under international human rights instruments. However, exercising the right to self-determination has always relied on finding a delicate equilibrium in the *realpolitik*¹⁵² of the great powers in international society.¹⁵³ Indeed, the mix between theoretical self-determination and *realpolitik* of self-determination often resembles that of oil and water: the thin layer of theory floats on top and often disguises the vast depths of *realpolitik* considerations.¹⁵⁴ The present study reviews the relationship between the rise of nationalism and the establishment of new states within international law, while also illuminating the interplay of law and politics.

The historical lineage of the modern concepts of self-determination can be traced to the rise of nationalism and the establishment of nation-states.¹⁵⁵ The American and French¹⁵⁶ Revolutions molded the modern self-determination of 'peoples' and concentrated on 'popular sovereignty'.¹⁵⁷ From these historical events, the classical and the romantic theories of self-determination

151 ibid 96, para 225; The Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (*Ministry of Foreign Affairs of the People's Republic of China*, 7 December 2014) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 3 March 2017.

152 John A Collins, 'Self-Determination in International Law: The Palestinians' (1980) 12 Case Western Reserve Journal of International Law 137.

153 Gary Goertz and Paul F Diehl, 'International Norms and Power Politics' in Frank W. Wayman and Paul F Diehl (eds), *Reconstructing Realpolitik* (The University of Michigan Press 1994) 109–12; Paul Eden, 'Palestinian Statehood: Trapped between Rhetoric and Realpolitik' (2013) 62 International and Comparative Law Quarterly 225, 227; M Cherif Bassiouni, 'The Perennial Conflict Between International Criminal Justice and Realpolitik,' (2006) 22 (3) Georgia State University Law Review 541, 558.

154 Collins, (n 152) 143.

155 L Chen, 'Self-Determination and World Public Order' (1991) 66 Notre Dame Law Review 1287, 1288.

156 B Wells, *United Nations Decisions on Self-Determination* (PhD Thesis, New York University 1963) 1–14. Quoted in Peter Radan, *Break-Up of Yugoslavia and International Law* (Routledge 2001) 8.

157 TM Franck, 'Post-Modern Tribalism and the Right to Secession,' in Catherine Brolmann, Rene Lefebvre and Marjoleine Zieck (eds), *Peoples and Minorities in International Law* (Martinus Nijhoff 1993) 3, 6.

emerged.¹⁵⁸ These theories portrayed interesting relationships between 'nations' and their 'people'.¹⁵⁹ Under the 'classical' theory, 'people' were defined in essentially territorial terms.¹⁶⁰ The theory affirmed that the 'population of a particular territorial entity', namely the 'state', constituted a 'people'.¹⁶¹ After the French Revolution, nationhood was seen to be connected to the territorial framework of the state.¹⁶² On the other hand, the romantic theory defined a 'nation' as being comprised of groups that had a 'specific culture',¹⁶³ having a common history, language,¹⁶⁴ literature, and religion.¹⁶⁵ Germany utilised romantic nationalism to define the German 'people'. Therefore, the German national consciousness has always focused on the concept of the *Volk*. Hence, 'self-determination' as well as 'people' is majorly defined by international practice as well as by the 'essence' of groups that have achieved self-determination.¹⁶⁶ Under both theories, Kashmir emerges as having the right to self-determination, both in terms of territorial limits (under the classical theory) as well as based on their ethnicity or *Kashmiriyat*, their culture and common history (under the romantic theory).¹⁶⁷

These nationalist principles provided the basis for the formation of a number of new states and, finally, at the end of WWI formed the basis of the

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- 158 The 'classical' and 'romantic' labeling of self-determination theories is adopted from Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241, 249–50.
- 159 Rosalyn Higgins, *Problems and Process- International Law and How We Use It* (Clarendon Press 1994) 111–28; Lone, (n 2) 14.
- 160 Lone, (n 2) 13.
- 161 *ibid* 13–14.
- 162 Peter Radan, *Break-Up of Yugoslavia and International Law* (Routledge 2001) 16.
- 163 Anthony D Smith, *Nationalism in the Twentieth Century* (Australian National University Press 1979) 2–3; Ernest Gellner, *Nationalism* (Weidenfeld & Nicolson 1997) 69. According to Gellner it was the culture that defines and makes 'nations'.
- 164 Isaiah Berlin, *The Proper Study of Mankind: An Anthology Essays* (Chatto & Windus 1997) 380–81; D. Heater, *The Theory of Nationhood: A Platonic Symposium* (Macmillan Press Ltd 1998) 69; Nathaniel Berman, 'Nationalism Legal and Linguistic: The Teachings of European Jurisprudence' (1992) 24 *New York Journal of International Law and Politics* 1515, 1520.
- 165 The religious root of the English and the Serbian nationalism serves as an example. Adrian Hastings, *The Construction of Nationhood, Ethnicity, Religion and Nationalism* (CUP 1997) 14–18, 35–65.
- 166 W Otuatye-Kodjoe, *The Principle of Self Determination in International Law* (Nellen Publishing Co 1977) 151.
- 167 Lone, (n 2) 14.

dismemberment of the Austro-Hungarian and Russian Empires.¹⁶⁸ Lenin¹⁶⁹ and Wilson¹⁷⁰ brought ideas about self-determination into the international limelight. The Aaland case sums up the position of international law on self-determination after WWI.¹⁷¹ The focus was on a special regime for protecting minorities. The Commission in the Aaland case declared that the identity of Aalanders should be protected¹⁷² in Finland.

As pointed out in Chapter 3, in the post-WWII era the status of the right to self-determination has changed considerably, going from a political concept to a legal right and has played a significant role in political and legal debate across the world.¹⁷³ The decolonisation process became the instrument for granting colonial people the right to self-determination.¹⁷⁴ Self-determination became part of many international instruments and declarations, including the United Nations Charter (1945), UN GA Resolution 1514,¹⁷⁵ UN GA Resolution 1541,¹⁷⁶ the International Covenant on Civil and Political Rights (ICCPR),¹⁷⁷ the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁷⁸ and UN GA Resolution 2625.¹⁷⁹

168 Hurst Hannum, *Autonomy, Sovereignty and Self-Determination* (University of Pennsylvania Press 1990) 28.

169 Antonio Cassese, *Self-Determination of Peoples-A Legal Reappraisal* (CUP 1995) 14, 16.

170 Malcolm N. Shaw, *Title to Territory on Africa: International Legal Issues* (Clarendon Press 1986) 60–61.

171 Report of the International Commission of Jurists entrusted by the Council of the LON with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands question, *League of Nations O.J. Spec. Supp. 3*, at 3 (1920); Philip Marshall Brown, 'The Aaland Islands Question' (1921) 15 *American Journal of International Law* 268–72.

172 Agreed Guarantees for the Autonomy and Swedish Character of the Aaland Islands were annexed to the League Council Resolution of 24 June 1921, and a Convention on Demilitarisation and Naturalisation of the Aaland Islands concluded on 20 October 1921.

173 Henry J Steiner and Philip Alston, *International Human Rights in Context- Law, Politics, Morals* (2nd edn, OUP 2000) 1248.

174 Gudmundur Alfredsson, 'Different Forms of and Claims to the Right to Self-Determination' in Donald Clark (ed), *Self-Determination- International Perspectives* (MacMillan Press 1996) 58, 60.

175 Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res 1514 (XV) (14 December 1960).

176 UNGA Res 1541(XV) (5 December 1960) UN Doc A/RES/1541(XV), Annex, Principles VI.

177 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

178 International Covenant on Economic, Social, and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

179 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UNGAOR 25th Session Supp No. 28 UN Doc A/8028 (1970).

In 1947, when the partition of British India occurred, the concept of self-determination was gaining acceptance within international law.¹⁸⁰ Furthermore, conducting plebiscites remained a popular way of determining the future of colonised peoples. The Security Council supported using a plebiscite to determine the 'will' of the Kashmiri people,¹⁸¹ and it was to be conducted after the demilitarisation of Kashmir.¹⁸² However, such a plebiscite has still not taken place and the very promise seems to have been reneged on. This has remained a source of conflict in Kashmir, as well as between India and Pakistan. At the level of international law the accession of Kashmir to India could have been given legal effect through a plebiscite. Chapter 3 explores the extent to which, within international law literature, Indian Native or Princely States and protected states were entitled to decolonisation. British policy suggested that the British Crown was of the view that these Indian States were free to accede to India or Pakistan or neither. Moreover, Section 7 of the India Independence Act 1947 only provided for the 'lapse' of suzerainty over the Indian States. Arguably, the Princely States like Kashmir that did not accede were rendered fully independent.¹⁸³ These significant aspects of Kashmir's history and right to self-determination, along with analyses of contemporaneous domestic law such as the Indian Independence Act 1947 and the Government of India Act 1935, as well as the perspective of the British Foreign Office Legal Advisor on the validity of Kashmir's accession to India,¹⁸⁴ are reviewed in detail in Chapter 4.

Decolonisation was mostly carried out within the colonial administrative borders under the principle of *uti possidetis*,¹⁸⁵ which favoured the stability and finality of colonial borders and, therefore, protected the territorial integrity of colonies. However, there were exceptions to this general rule and some new states were created during decolonisation on the basis of the romantic theory and the *realpolitik* of the time. Some significant examples are the partition of British India into the new dominions of India and Pakistan,¹⁸⁶ ostensibly

180 Farrell, (n 12) 308–09.

181 UNSC Res 47 (1948) SCOR, 3rd Sess UN Doc. S/726.

182 Farrell, (n 12) 299.

183 Crawford, (n 22) 321–23.

184 'Validity of Kashmir's Accession to India', (n 20).

185 See generally, Steven R Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of the New States' (1996) 90 American Journal of International Law 590; Malcolm N. Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1997) 67 British Year Book of International Law 75, 97.

186 The British Cabinet Mission Plan of 1946, which advocated the 'one nation' theory of a confederated, unified India, was abandoned due to communal conflicts and religious differences. Javaid Rehman, 'Reviewing the Right of Self-Determination: Lessons from the Experience of the Indian Sub-Continent' (2000) 29 Anglo-American Law Review 454, 462.

on the basis of religion, and the establishment of the State of Israel in 1947 in the aftermath of WWII.¹⁸⁷ Hence, it was under the tag of nationalism that claims for self-determination was usually pursued.¹⁸⁸ The principle of *uti possidetis* can apply in illegal annexation cases, such as the Baltic States, as it represented a practical solution¹⁸⁹ for settling border issues between the newly created states after the disintegration of the Soviet Union (though there were disputes about the exact applicable laws and treaties).¹⁹⁰ These issues and their relevance to the Kashmir question will be touched upon in several different chapters.

Since the 1970s support has grown for exercising the right to self-determination beyond colonial borders. In some cases this meant allowing secession, particularly where there were human rights violations, unrepresentative governments that persistently refused people participatory rights,¹⁹¹ and in places that needed to liberate occupied territories.¹⁹² The developments relating to the right to self-determination in the post-colonial era have also led to problems, since the right has been used by the ethno-separatist movements¹⁹³ such as Basques, Kurds, Chechens, and Tamils etc. To claim self-determination. For this reason, nationalist movements claiming self-determination have become very controversial in the post-colonial era.¹⁹⁴ Generally, international law does not recognise the right to secession for mere historical grievances as in such cases

187 Declaration of Establishment of State of Israel 14 May 1948; F. Gervasi, *The Case for Israel* (The Viking Press 1967) 204–08.

188 Sarah Wambaugh, *Plebiscites since the World War* (Carnegie Endowment for International Peace 1933) vols 1, 3.

189 See generally, Fozia Nazir Lone 'Uti Possidetis Iuris' Oxford Bibliographies Online: International Law (2012).

190 Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff 2005) 26; Ineta Ziemele, 'The Application of International Law in the Baltic States' (1997) 40 *German Yearbook of International Law* 243, 251, 271.

191 Cassese, (n 1) 119.

192 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UNGAOR 25th Session Supp No. 28 UN Doc A/8028 (1970); Vienna Declaration and Programme of Action, World Conference of Human Rights (adopted on 25 June 1993).

193 Henry J Steiner and Philip Alston, *International Human Rights in Context- Law, Politics Morals* (2nd edn, OUP 2000) 1248.

194 Malcolm N Shaw, 'The Definition of Minorities in International Law' in Yoram Dinstein and Mala Tabory (eds), *The Protection of Minorities & Human Rights* (Nijhoff 1992) 1, 2.

it is more of a problem than a solution.¹⁹⁵ For example, the secessions of South Ossetia and Abkhazia from Georgia have not been accepted by the international community.¹⁹⁶

However, Russia has recognised Abkhazia and South Ossetia.¹⁹⁷ Both regions were semi-autonomous in Georgia and were considered 'autonomous regions' in the Soviet Union.¹⁹⁸ Today, both South Ossetia and Abkhazia are *de facto* separated from Georgia.¹⁹⁹ South Ossetia was an autonomous administrative district of Georgia.²⁰⁰ In 1991, a war broke out between Georgia and South Ossetia but in 1992 a cease-fire agreement was signed.²⁰¹ However, since 1992, South Ossetia has been *de facto* separated from Georgia²⁰² and under the influence of Russia.²⁰³ Likewise, in 1992 the conflict between Georgia and Abkhazia accelerated with Russia's support.²⁰⁴ Since 1993, Abkhazia has been *de facto* separated from Georgia.²⁰⁵ After the conflict in 2008, Russia recognised the independence of both South Ossetia and Abkhazia.²⁰⁶ At the United Nations, Georgia has refused such 'territorial swaps'.²⁰⁷ However, the European Union reached an agreement with Georgia to not use violence after they promised to deploy a 200 strong observational force.²⁰⁸ Despite Russia's recognition, which has been considered to be motivated by its desire to exert power over

195 Nartnirun Junngam, 'The Secessionist Movement in the Southernmost Provinces of Thailand: A View from the New Haven School of International Law' (2012) 20 Asia Pacific Law Review 233, 233–34.

196 Simon, (n 131) 141.

197 Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (n 33) 4, 14.

198 Simon, (n 131) 141; Charlotte Hille, 'Recognition of South Ossetia and Abkhazia two years later: Unicom or trendsetting?' (2010) 21 Sec. & Hum. Rts. 153, 154; Müllerson, 'Precedents in the Mountains', (n 33) 2, 7–8.

199 Simon, (n 131) 141.

200 *ibid.*

201 Niklas Nilsson, 'Georgia's Conflicts: Abkhazia and South Ossetia' in Svante Cornell and Michael Jonsson (eds), *Conflict, Crime, and the State in Post-communist Eurasia* (University of Pennsylvania Press 2014) 105.

202 Borgen, (n 36) 5.

203 Nilsson, (n 201) 126–127.

204 *ibid.* 105.

205 Borgen, (n 36); Simon, (n 131) 141; Nilsson, (n 201) 113, 116.

206 Borgen, (n 36) 6.

207 Weller, (n 11) 134.

208 *ibid.* 148.

Georgia,²⁰⁹ there has been no general support from the global community.²¹⁰ This was mainly because Georgia had legitimate legal authority over the two autonomous areas, and because Georgia has not been found to have committed abuses that amount to violations of peremptory norms.²¹¹

It is accepted within international law that human rights violations do constitute threats to peace²¹² and, as such, support for self-determination claims has been shown in cases involving grave and systematic human rights violations against the inhabitants of a territory.²¹³ Clearly, remedial secession is a moral claim of last resort, triggered by violations of peremptory norms and compounded by unjust annexation or violations of agreements.²¹⁴ In its Advisory Opinion on the *Unilateral Declaration of Independence in Respect of Kosovo*²¹⁵ the International Court of Justice did not clarify the normative content of the law relating to self-determination or secession. The court, under Article 65 of the Statute of the International Court of Justice 1945, viewed the 'legal question' put to it conservatively and focused mainly on SCR 1244 (1999).²¹⁶

The legality of Kosovo's unilateral declaration was put before the Court by the United Nations at the request of Serbia.²¹⁷ The question was, 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'²¹⁸ The ICJ's advisory response was that 'the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the

209 Andrew Coleman, 'The Right to Self-Determination: Can it Lapse?' (2014) 5 *Journal of the Philosophy of International Law* 6, 16.

210 Sterio, (n 33) 168; William R. Slomanson, 'Legitimacy of the Kosovo, South Ossetia and Abkhazia secessions: Violations in search of a rule' (2009) 6 *Miskolc Journal of International Law* 1, 27.

211 Simon, (n 131) 141.

212 W Michael Reisman and Eisuke Suzuki, 'Recognition and Social Change in International Law: A Prologue for Decision making' in W Michael Reisman and Burns H Weston (eds), *Toward World Order and Human Dignity: Essays in Honor of Myres S McDougal* (Free Press, 1976) 424.

213 Srdjan Cvjic, 'Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo' (2007) 8 *German Law Journal* 57, 74.

214 Simon, (n 131) 143–44, 146.

215 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (n 37) 452.

216 UNSC 1244(1999) (10 June 1999) UN Doc S/RES/1244(1999).

217 Borgen, (n 36) 14.

218 *ibid*.

adoption of that declaration did not violate any applicable rule of international law'.²¹⁹ The court has come under criticism for avoiding a deeper discussion on international law.²²⁰

Nonetheless, scholars such as Groarke²²¹ have asserted that there is a political right to secede that may arise independently of any legal right. Turp²²² goes a step further and argues that within international law a 'relatively fragile' right to secession exists. Buchanan²²³ is of the view that international law has bestowed a degree of legitimacy on some of the groups of 'peoples' to secede, although in a haphazard manner. Buchheit takes a moderate view and argues that 'oppression legitimises secession'.²²⁴ Müllerson²²⁵ suggests that minorities not only have the right to secede in the cases of gross human rights violations, but that the world community has the 'right to intervene' when the state concerned is in flagrant violation of international law. Others, such as Musgrave²²⁶ and Pomerance,²²⁷ argue that the right to secede for minorities arises when they are oppressed by the unrepresentative government in a manner that gives rise to serious concerns with respect to human rights.

In February 2008, when Kosovo declared unilateral independence, it left the EU split as to whether they should recognise it or not.²²⁸ The USA²²⁹ and UK²³⁰ formally recognised Kosovo as a sovereign independent state. On the other hand, Cyprus, Greece, Romania, Bulgaria, and Slovakia expressed anxiety

219 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, (n 37) 452.

220 Simon, (n 131) 109.

221 Paul Groarke, *Dividing the State-Legitimacy, Secession and the Doctrine of Oppression* (Ashgate 2004) 1.

222 Daniel Turp, 'Le droit de sécession en droit international public' (1982) 20 *Canadian Yearbook of International Law* 24, 76.

223 See generally, Allen Buchanan, *Secession, the Morality of Political Divorce from Fort Sumter to Lithuania and Quebec* (Westview Press 1991).

224 Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978).

225 Müllerson, *International Law, Rights and Politics* (n 33) 91.

226 Thomas D Musgrave, *Self-Determination and National Minorities* (OUP 2000) 2.

227 Michla Pomerance, *Self-Determination in Law a*

228 Stephen Castle, 'Behind the scenes, EU splits over Kosovo' *New York Times* (New York, 18 February 2008) <<http://www.nytimes.com/2008/02/18/world/europe/18iht-diplo.5.10161693.html>> accessed 3 March 2017.

229 Paul Reynolds, 'Kosovo: To recognise or not to recognise?' (*BBC News* 24, 18 February 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7250764.stm>> accessed 3 March 2017.

230 'UK Recognises Kosovo Independence' (*Reuters UK*, 18 February 2008).

about the signal that Kosovo's recognition might send to separatists.²³¹ Non-EU States like China,²³² Russia,²³³ and India²³⁴ also expressed their concern over Kosovo's unilateral declaration of independence. Recognition of secession has therefore been seen by some countries as potentially enflaming conflicts at home.²³⁵ Hence, the concept of secession is usually seen as a 'bad recipe'²³⁶ and an assault on territorial integrity.²³⁷ Despite this, international state practice on secession suggests that it has been accepted very selectively, such as in cases where there have been mass human rights violations or the presence of unrepresentative governments. Western nations took a particularly serious approach when combating human rights violations in Bosnia and Kosovo, and those violations were recognised in assessing their self-determination claims.

In Bosnia, due to continued Serb aggression, UN intervention was followed by NATO's involvement in order to restore stability. In 1992, a Bosnian independence referendum was conducted and the people opted for independence, which was recognised by the US as well as the European Economic Community. Later, some leaders were tried at the International Criminal Tribunal for the former Yugoslavia (ICTY).²³⁸ Likewise in Kosovo, Serbian political repression and Kosovar resistance took a violent shape. United Nations Security Council Resolution 1244 (1999)²³⁹ promoted self-government and democracy for the inhabitants of Kosovo, but UN intervention was not seen to be sufficient. In 1999, NATO militarily intervened.²⁴⁰ Five of the six members of the Serbian

231 Staff, 'Recognition for new Kosovo grows' (*BBC News* 24, 18 February 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7251359.stm#map>> accessed 3 March 2017.

232 Statement of Chinese Foreign Ministry spokesman Liu Jianchao, as cited in Paul Reynolds, 'Kosovo: To recognise or not to recognise?' (*BBC News* 24, 18 February 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7250764.stm>> accessed 3 March 2017.

233 Staff, 'Recognition for new Kosovo grows' (*BBC News* 24, 18 February 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7251359.stm#map>> accessed 3 March 2017.

234 'Kashmir Separatists Buoyed by Kosovo Declaration' (*Islamic Republic News Agency*, 19 February 2008) (Comments of Indian Foreign Minister Pranab Mukherjee).

235 Charlotte Hille, 'Recognition of South Ossetia and Abkhazia two years later: Unicum or trendsetting?' (2010) 21 Sec. & Hum. Rts. 153, 153.

236 Ü. Enginsoy, Greece Sees Kosovo Independence as 'bad recipe' for region, *Turkish Daily News* (Istanbul, 15 February 2008) <<http://www.turkishdailynews.com.tr/article.php?enewsid=96422>> accessed 8 May 2008.

237 Groarke, (n 221) 3.

238 Staff, 'Bosnia-Herzegovina profile – Timeline' (*BBC News*, 24 October 2016) <<http://www.bbc.com/news/world-europe-17212376>> accessed 9 December 2016.

239 Security Council resolution 1244 (1999) [on the deployment of international civil and security presences in Kosovo], 10 June 1999, S/RES/1244 (1999).

240 Simon, (n 131) 114.

leadership were eventually convicted for their crimes against Kosovo Albanians at the ICTY in 2009.²⁴¹ Kosovo's independence was supervised through a UN Mission that had a mandate under Resolution 1244 and, subsequent to independence, it negotiated a settlement that allows for the European Union Rule of Law Mission in Kosovo to monitor the situation.²⁴²

Unfortunately Kashmir has not received such kind of attentions from the international community with regards to issues of human rights violations and their struggle to realise self-determination. The secession of Bangladesh seems to be an exception, and was accomplished through Indian intervention that many believe was to defeat its adversary, Pakistan.²⁴³ In 1971, the India-Pakistan war was followed by Indian forces entering the territory of East Pakistan on the basis that a humanitarian intervention was needed.²⁴⁴ The Indian victory resulted not only in the secession of East Pakistan, (now Bangladesh)²⁴⁵ but also led to further territorial gains for India in Kashmir as Indian forces increased their advantage along the line of control.²⁴⁶ In 1972 Pakistan had lost territory and was in a weaker position, and India hoped to assert itself as a regional power. It was in this context that India and Pakistan signed a bilateral settlement called the Simla Agreement, through which India wished to settle its pending disputes including Kashmir, with Pakistan.²⁴⁷ Since then, India has insisted that the Kashmir issue can only be resolved bilaterally, while ignoring flagrant human rights violations in Kashmir. Chapter 6 discusses this issue and the extent to which the Simla Agreement of 1972 (which was a post-war negotiation settlement connected to the creation of

241 *Prosecutor v Milutinovic et al.* (Judgment) – vol 2, IT-05-87-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2009.

242 UN Mission in Kosovo, 'UNMIK: Mandate and Structure' (UNMIK, 30 June 2014) <<http://www.unmikonline.org/Pages/about.aspx>> accessed 30 June 2016; Weller, (n 11) 152.

243 Srinath Raghavan, 1971: *A Global History of the Creation of Bangladesh* (Harvard University Press 2013) 54–79.

244 Farrell, (n 12) 304.

245 Bangladesh on September 17 1974 by GA resolution 3203 (XXIX) was recognised as a UN Member State.

246 Richard Sisson and Leo Rose, *War and Secession: Pakistan, India and the Creation of Bangladesh* (University of California Press 1990) 234; Farrell (n 12) 304. The Simla Agreement 2 July 1972 para 4(ii) states: (ii) 'In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this Line.'

247 Farrell, (n 12) 304–05.

Bangladesh) can be used to hinder progress and thereby deprive the Kashmiri people of their right to self-determination granted to them in this human rights era by the international community in the form of various UN SCRs, declarations, and *jus cogens* norms.

Many states subscribe to the foreign policy of bilateralism as a solution for Kashmir and this unfortunate development suggests that Kashmiri peoples' historical, racial, and ethnic identities—including their self-determination claims are prevented from developing separately and are instead downgraded to what could be tolerated or labelled in European societies as minority rights.²⁴⁸ This study maintains that the Kashmir question is not a case of secession or minority rights, although the systematic human rights violations and the presence of an unrepresentative government are factors that allow them this alternate argument under the post-WWII law on self-determination. Instead it is a claim for Kashmiris' right to self-determination and the restoration of their historical title. Clearly, just like the Baltic States, Kashmir's situation cannot be resolved by procedural remedies such as allocating them minority rights, since their claim is based on the restoration of their historical title. Exercising self-determination is the only way they can fully claim their historical title to their territory. This aspect is discussed in Chapter 4.

In light of the foregoing discussions on the foundational concepts of the restoration of historical title and the right to self-determination that are applied in this book to the Kashmir question, this study's point of departure is that the realisation of these legal claims are deeply rooted in 'vast depths of *realpolitik* considerations'²⁴⁹ and the international community's political will to support such claims. As such, this study adopts a multidisciplinary approach to demystify the core issues, factors, and processes involved in the Kashmir dispute.

Note of Sources: Approaches to the Kashmir Question and the Novel Approach Embraced by this Study

The history of the territory of Kashmir from its sale by the British to its accession to India and beyond, has been described in terms of different

248 David Kennedy and Chris Tennant, 'New Approaches to International Law: A Bibliography' (1994) 35 *Harvard International Law Journal* 417 421–22; Lama Abu-Odeh, 'Post-colonial Feminism and the Veil: Considering the Differences' (1992) 26 *New England Law Review* 1527.

249 Collins, (n 152).

paradigms.²⁵⁰ This study revisits the Kashmir question from its inception to the present time by taking a unique multidisciplinary approach to exploring the international law concerning the restoration of historical title and right to self-determination. While doing so, this work highlights the relevant Indian, Pakistani, and Kashmiri scholarship on crucial aspects, major debates, and trends relating to the Kashmir question.

Prior to this study, there has been no monograph written on the Kashmir question that analyses it simultaneously from the perspective of international law concepts such as the restoration of historical title and self-determination,²⁵¹ as well as reviewing it in terms of archival, historical, political, and policy paradigms. These legal principles, multidisciplinary paradigms, and scholarly debates are brought together in this book in a harmonious manner so that they may complement each other and help us to understand the issues involved. All this is used to form recommendations that could move us towards the resolution of the Kashmir question.

The work departs from other scholarship on the Kashmir question because it considers the law, politics, history, policy and human rights etc. involved in the situation and demonstrates that international law is deeply rooted in politico-historical features, and that this background forms an inseparable dimension in the study of the Kashmir question. This study (i) revisits the complicated history of Kashmir by reviewing the archival documents; (ii) re-examines the Kashmir question by studying international substantive law on the restoration of historical title, self-determination, statehood, occupation, state continuity etc. As well as the political practices of the international community; (iii) re-evaluates the content of primary archival sources and the legal opinion of Fitzmaurice on the legality of the Instrument of Accession signed between the ruler of Kashmir and the Indian government in 1947; (iv) considers the policies of the UK on political self-determination and whether it is rooted in the Security Council Resolutions on Kashmir, which call for the conduct of a plebiscite to determine Kashmir's political status; (v) revisits questions surrounding the validity of the constitutional incorporation of Kashmir into the Union of India, which was followed by the installation of an unrepresentative government

250 Fozia Nazir Lone, 'From "Sale to Accession Deed" – Scanning the Historiography of Kashmir 1846–1947' (2009) 7(6) *History Compass* 1496.

251 Farrell, (n 12). The author argues that taking into account the principle of self-determination, the parties should work bilaterally toward an agreed resolution with the assistance and urging of the international community. Cooperation between India and Pakistan will be the key in bringing long-term stability to this volatile region. (p. 318).

that is now involved in committing gross human rights abuses; (vi) reassesses the foreign policy and legal position ('internal intention' or *opinio juris*) of the international community while recognising the emerging and continuing dangers. Such dangers include as the colossal scale of human rights violations in Kashmir;²⁵² India and Pakistan's nuclear armament and unpredictable security relations (which could cause nuclear instability in South Asia) as well as the Al-Qaeda²⁵³/ ISIS²⁵⁴ terrorist infested Afghanistan/Pakistan border that is geographically close to Kashmir and might lead these terror groups to hijack the Kashmir conflict, leading to spread of terrorism/extremism²⁵⁵ in Kashmir.

The legal, archival, scholarly, theoretical, and philosophical discourse adopted in this study distances it from the narrow methodologies that have sometimes been adopted when approaching this complicated issue. It is believed that this monograph provides a novel contribution to both understanding the Kashmir question and the applicable substantive international law.

Approach Adopted to the Kashmir Question within International Law

International law literature has paid scant attention to the Kashmir question. However, some scholars have taken up the issue. Crawford, in the 1979 edition of his book, mentioned Kashmir while discussing the creation and status of

²⁵² Bashir Ahmed Dabla, 'Sociological Dimensions and Implications of the Kashmir Problem,' in NA Khan (ed), *The Parchment of Kashmir: History, Society and Polity* (Palgrave Macmillan 2012) 181; See generally, Robinson, (n 16) 344; Agana P Chatterji, Parvez Imroz, Gautam Navlakha, Zahir-Ud-Din, Mihir Desai and Khurram Parvez, *Buried Evidence: Unknown, Unmarked and Mass Graves in Indian-Administered Kashmir, a preliminary report* (International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir 2009) <<http://www.kashmirprocess.org/graves>> accessed 21 February 2017; Asia Watch and Physicians for Human Rights, *Rape in Kashmir: A Crime of War* <<https://www.hrw.org/sites/default/files/reports/INDIA935.PDF>> accessed 21 February 2017; Amnesty International, *Denied: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir* (ASA 20/1874/2015, Amnesty International Ltd 2015) <<https://www.amnesty.org/download/.../ASA2018742015ENGLISH.PDF>> accessed 22 February 2017.

²⁵³ Navnita Chadha Behera, 'Kashmir: Redefining the U.S Role' The Brookings Institution Policy Brief #110 (November 2002).

²⁵⁴ Annalise Lekas, 'ISIS: The Largest Threat to World Peace Trending Now' (2015) 30 *Emory International Law Review* 313.

²⁵⁵ Gus Martin, *Understanding Terrorism- Challenges, Perspectives and Issues* (2nd edn, Sage Publications 2006) 293.

dependent entities within international law under the heading of vassal states and suzerainty. He stated that the terms ‘vassal’ and ‘suzerainty’ are derived from feudal law and their translation into the field of international relations is a ready source of confusion.²⁵⁶ Fawcett argued that prior to 1947 the British believed that the principles of international law had no bearing on relations between the Government of India and Native or Princely States under the suzerainty of Her Majesty.²⁵⁷ Kamanda argued that under contemporaneous international law, the status of the Native or Princely States was similar to that of the international protectorates.²⁵⁸

According to Crawford, at the time of the decolonisation of British India, the Crown changed its mind as to the Indian States and ‘despite paramountcy the Indian States were regarded as free to accede to India or Pakistan or neither and no constitutional authority was thought to exist to force such accession’.²⁵⁹ He suggests that the Indian Independence Act 1947 merely provided for the lapse of suzerainty over the Indian States, so it is arguable that those states that had not acceded to the dominion of either India or Pakistan were rendered fully independent, and this would include the Princely States of Hyderabad and Kashmir.

However, in the 2006 edition of Crawford’s book his position seems to have changed in respect to Kashmir and, despite calling it an independent entity, Crawford portrays the Kashmir conflict as being an ‘unsuccessful attempt of secession’.²⁶⁰ The present study rejects this assessment, particularly because of the unexplained contradiction of Crawford’s prior position, when he agreed that Kashmir was an independent state in 1947 after paramountcy lapsed. This is not to single out Crawford: Groarke²⁶¹ also considers Kashmir to be a case of secession. This is portrayal is rejected because, firstly, India does not have legitimate legal authority or an uncontested title to any part of the territory of Kashmir and secondly, the accession (as per archival documents) is legally invalid. Thirdly, under the SCRs Kashmir has been granted the right to self-determination, which is a means for its people to restore their historical title.

256 Crawford, (n 22) 209–11.

257 James Edmund Sandford Fawcett, *The British Commonwealth in International Law* (Stevens & Sons, Ltd 1963).

258 Alfred M Kamanda, *A Study of the Legal Status of Protectorates in Public International Law* (Thesis, Geneva 1961) cited in Crawford, (n 22) 209, 211.

259 Crawford, (n 22) 209.

260 *ibid* 403.

261 Groarke, (n 221) 1.

This is not compatible with the concept of secession. Fourthly, the human rights violations in Kashmir are happening as a consequence of the people's consistent claims for their historical right to their territory. Clearly, if Kashmir was independent in the past, it cannot be said to be trying to secede from a state that militarily occupied it.²⁶² As discussed earlier, the legal continuation of an independent state does not cease as a result of occupation. Instead, it continues to exist as a subject of international law.²⁶³ The Kashmir question is similar to that of the Baltic States and is mainly a claim concerning the restoration of historical title. The exercise of self-determination is only an instrument to realise this 'historical title'. As such, Kashmiri independence would not be a case of secession like Kosovo,²⁶⁴ South Ossetia, Abkhazia,²⁶⁵ Quebec,²⁶⁶ Xinjiang,²⁶⁷ Chechnya,²⁶⁸ etc.

Applying autonomous structures (as in Hong Kong)²⁶⁹ or granting more minority or indigenous rights²⁷⁰ to Kashmiris is not a plausible solution either.

262 Van Elsuwege, (n 123) 378.

263 See generally, Dainius Žalimas, 'Legal and Political Issues on the Continuity of the Republic of Lithuania' (1999) 4 *Lithuanian Foreign Policy Review* 111–12.

264 Simon, (n 131) 141; Borgen, (n 36) 5.

265 Müllerson, 'Precedents in the Mountains', (n 33) 7; Nilsson, (n 201); Weller, (n 11) 134.

266 Mark D Walters, 'Nationalism and the Pathology of Legal Systems: Considering the Quebec Secession Reference and Its Lessons for the United Kingdom' (1999) 62 *The Modern Law Review* 371; Stephane Dion, 'Why is Secession Difficult in Well-Established Democracies? Lessons from Quebec' (1996) 26 *British Journal of Political Science* 269.

267 Garnder Bovingdon, *Autonomy in Xinjiang: Han Nationalist Imperatives and Uighur Discontent* (East-west Centre Washington 2004) 14–15; BG Phan, 'How Autonomous are the National Autonomous Area of the PRC? An Analysis of Documents and Cases' (1996) 32 *Issues & Studies* 83–108.

268 Richard Sakwa (ed), *Chechnya: From Past to Future* (Anthem Press 2005); James Hughes, *Chechnya: From Nationalism to Jihad* (University of Pennsylvania Press 2007); Tony Wood, *Chechnya: The Case for Independence* (Verso 2007).

269 Phil C W Chan, 'Hong Kong's Political Autonomy and its Continued Struggle for Universal Suffrage' *Singapore Journal of Legal Studies* (2006) 285, 288; Kalana Seneratne, 'Beyond the Internal/External Dichotomy of the Principle of Self-Determination' (2013) 43 *Hong Kong Law Journal* 463, 472; Roda Mushkat, 'The Politico-Economic Context of Special Regional Autonomy: International and Constitutional Law Meets the Hong Kong Predicament' (2016) 46 *Hong Kong Law Journal* 287, 295; Fozia Nazir Lone, 'The Enigma of the Hong Kong Injunction Cases – A Perspective on Political Question Doctrine, Separation of Powers, Rule of Law and Universal Suffrage' (2016) 10 *Vienna Journal on International Constitutional Law* 3.

270 Minority people have the right to enjoy their own culture, to profess and practise their own religion, or to use their own language, as stated in art 27 of International Covenant on Civil and Political Rights <<https://treaties.un.org/doc/publication/unts/volume%20>

Firstly, a minority rights regime is applicable to internal self-determination, and this study revisits the Kashmir issue in terms of its right to external self-determination. Secondly, India does not have an indisputable and uncontested right to the territory of Kashmir. Thirdly, Kashmir today is divided between two sovereign states, making it difficult to apply procedural remedies such as minority rights, autonomy and devolution, which may be applicable to minority or indigenous peoples elsewhere. Fourthly, the mass human rights violations, entrenched impunity, and general lawlessness that India allows in Kashmir are firm indicators that any such proposed minority rights scheme would be a paper promise at best. Finally, Kashmiri people cherish their ethnic and religious diversity, which has formed the basis for their culture of *Kashmiriyat* since eighth century BC.²⁷¹ Hence, the application of a minority rights would be an attack on *Kashmiriyat*, as it would tend to divide people on the basis of their differences in culture, religion and language. Therefore, the approach to self-determination adopted by Anaya,²⁷² L  m,²⁷³ and Thornberry²⁷⁴ in relation to indigenous people, which includes the notion of democracy, cultural integrity, and self-government within the borders of a sovereign state, is not the subject matter of this study. Chapter 5 discusses the autonomy provision of Article 370, which India added to its constitution in 1950 to cover the special situation in Kashmir.²⁷⁵ However, it has not been respected by the Indian government and the powers of the Indian Parliament to make laws for the State of J&K has not been limited to defence, communications, and foreign affairs²⁷⁶ as stipulated by Article 370. Hence, internal self-determination in the form of autonomy²⁷⁷ has not been helpful to resolve the 70-year-old Kashmir conflict.

999/volume-999-i-14668-english.pdf> accessed 12 March 2017. See also Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP 1996); S. James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004).

271 Rushdie, (n 51) 57.

272 Anaya, (n 270).

273 MC L  m, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Transnational Publishers, Inc 2000).

274 Patrick Thornberry and Maria Est  banez, *Minority Rights in Europe- A Review of the Work and Standards of the Council of Europe* (Council of Europe Publishing 2004); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press 2002).

275 Anand, (n 65) 74.

276 Charles Henry Alexandrowicz, *Constitutional Development in India* (OUP 1957) 154.

277 See Lauri Hannikainen, 'Self-Determination and Autonomy in International Law' in Markku Suksi (ed) *Autonomy: Applications and Implications* (Kluwer Law International 1998) 79–96; Jane Wright, 'Minority Groups, Autonomy, and Self-Determination' (1999) 19 *Oxford Journal of Legal Studies* 605.

After weighing an array of arguments related to secession and minority rights, as well as keeping in mind that Kashmiris have kept their claim to territory alive over the period of 70 years, it is suggested that the restoration of historical title is the most appropriate approach to take when discussing solutions to the Kashmir question. The applicability of the right to self-determination in the colonial and post-colonial contexts, especially under the 1970 Declaration, strengthens the case for the restoration of historical title in Kashmir. As the study shows, the right to a plebiscite could be said to form a part of decolonisation process. However, for the reasons given above, it is strongly arguable that framing the conflict in terms of secession or proposing a minority rights regime are not the most beneficial approaches to the Kashmir situation.

Other Approaches to the Kashmir Question

The predominant approaches taken to the Kashmir question are limited to discussions on its history and culture, or the Indo-Pakistani dispute and separatism, etc. Overall, international scholarship on the Kashmir is rather limited.²⁷⁸ This study demonstrates that the Kashmir question exposes some gaps in contemporary international law, which has failed to properly devise a platform for assessing the statehood of protected states/suzerainties/Princely States and similar entities.

There is a large body of literature on Kashmir's ancient history and language.²⁷⁹ Renowned foreign writers like Lawrence,²⁸⁰ Burns,²⁸¹ and Neve,²⁸² some of whom have lived in Kashmir, have written on its history. Some literature on other Princely States also provides passing references to Kashmir.²⁸³ Rai focus on the Princely State of Kashmir under *Dogra* rule and investigates

278 Lone, (n 250).

279 Grierson, (n 49).

280 Walter R. Lawrence, *The Valley of Kashmir* (Henry Frowde, OUP Warehouse Amen Corner, E.C 1895).

281 William Burns Thomson, *A Memoir of William Jackson Elmslie* (3rd edn, London 1881).

282 Ernest F. Neve, *A Crusader in Kashmir* (Seeley, Service & Co. Ltd 1928); Tyndale C.E. Biscoe, *Tyndale-Biscoe of Kashmir- An Autobiography* (Seeley Service & Co. Ltd 1951).

283 Fiona Elizabeth Groenhout, 'The History of the Indian Princes: Bringing the Puppets Back onto Centre Stage' (2006) 4(4) History Compass 629; Khalid Latif Gauba, *His Highness or the Pathology of Princes* (The Loin Press 1945); Rosita Forbes, *India of the Princes* (Ebenezer Baylis and Son Ltd 1939).

why the Muslim subjects protested against the Maharaja's rule prior to 1947.²⁸⁴ Zutshi reviews the concept of *Kashmiriyat* as a distinctive cultural identity of Kashmiris along with their religious sensibilities.²⁸⁵ Korbel,²⁸⁶ Birdwood,²⁸⁷ Lamb,²⁸⁸ and Schofield²⁸⁹ intricately focus on the origins of the Kashmir dispute, citing historical sources and critically analysing the actions of the key players. Hodson,²⁹⁰ Collins,²⁹¹ and Moore²⁹² wrote on the transfer of power to British India and viewed Kashmir from side-lines as a historical tragedy. Kabir reviews historical antecedents of the Kashmir dispute.²⁹³

Much of the scholarship also focuses on autonomy,²⁹⁴ insurgency, proxy-war²⁹⁵ and ethnic issues²⁹⁶ in Kashmir. Ganguly²⁹⁷ starts with the premise that Kashmir is an integral part of India and focuses on tracing the roots of the insurgency in the portion of Kashmir under India. He proposes controlling the insurgency by (among other strategies) altering the demographic profile of Kashmir using the mailed-fist strategy and applying brutal military pressure,

284 Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights and the History of Kashmir* (Hurst & Company 2004); Prem Nath Bazaz, *The History of Struggle for Freedom on Kashmir* (Kashmir Publishing Company 1954).

285 Zutshi, (n 13).

286 Korbel, (n 47) 5.

287 Lord Birdwood, *India and Pakistan* (Frederick A. Praeger 1954).

288 Alastair Lamb, *Birth of a Tragedy- Kashmir 1947* (Roxford Books 1994); Alastair Lamb, *Incomplete Partition - The Genesis of the Kashmir Dispute 1947-1948* (OUP 2003).

289 Victoria Schofield, *Kashmir in the Crossfire* (Viva Books Pvt. Ltd 1997); Schofield, (n 38) 1.

290 Hodson, (n 13).

291 Larry Collins and Dominique Lapierre, *Freedom at Midnight* (Granada 1975).

292 Robin James Moore, *Escape From Empire: The Attlee Government and the Indian Problem* (Clarendon Press 1983).

293 Kabir, (n 2).

294 David E Lockwood, 'Sheikh Abdullah and the Politics of Kashmir' (1969) 9 *Asian Survey* 382; K.M. Teng, *Kashmir Article 370* (Anmol Publications 1990); Farzana Shakoor, 'The State Elections in Indian-held Kashmir' (1996) 49(4) *Pakistan Horizon* 61.

295 Sumit Ganguly and S. Paul Kapur, *India, Pakistan and the Bomb - Debating Nuclear Stability in South Asia* (Columbia University Press/Penguin 2010).

296 Sumit Ganguly, 'Explaining the Kashmir Insurgency: Political Mobilization and Institutional Decay' (1996) 21(2) *International Security* 76; Reeta Chowdhari Tremblay, 'Nation, Identity and the Intervening Role of the State: A Study of the Secessionist Movement in Kashmir' (1996-1997) 69 *Pacific Affairs* 471; Reeta Chowdhari Tremblay, 'Kashmir's Secessionist Movement Resurfaces: Ethnic Identity, Community Competition, and the State' (2009) 49 *Asian Survey* 924.

297 Sumit Ganguly, *The Crisis in Kashmir* (Woodrow Wilson Center Press/CUP 1997).

engaging in the wear-down option, involving extensive use of force through the military and negotiating with the groups that remain outside Kashmiri politics. Kumar²⁹⁸ states that Kashmir is a multicultural, multilingual, and multi-religious state and therefore Kashmiri Muslims should have had a similar choice as Indian Muslims did had at the time of partition. According to her, Kashmiris in the 'Vale of Kashmir' under India have to decide whether they are Muslims first or Kashmiris.²⁹⁹ The Kashmir crisis is a result of unabated violence and historic injustices and as long as they subsist, violence is bound to continue³⁰⁰ against Kashmiris. Therefore, the Kashmir question cannot be solved by proposals that suggest using harsh and inhumane strategies or by demonising the Kashmiri people's identity as the root of conflict and insurgency. The problem, as discussed in the present study, is the illegal occupation of the territory of Kashmir and the deprivation of Kashmiri people's historical title, which need to be addressed to find a just solution for this longstanding crisis.

Bose³⁰¹ accepts that the Kashmir issue involved a dispute over sovereignty, but settles for a peace-building process. He asserts that the *de facto* Indian and Pakistani sovereignties over their respective areas of Kashmir cannot should not and need not be changed. However, this approach to reconciliation perforates the peace process, as the people of Kashmir continue to be brushed aside. Bose also compares Kashmir with Northern Ireland and looks to that situation to gain insight on how India could deal with the Kashmir conflict. However, unlike Northern Ireland, Kashmir was occupied by a neighbouring state rather than being partially retained by the coloniser. The Northern Irish problem is related to diverse issues relating to national identity, allegiances based on religious sectarianism,³⁰² historical wrongs, and other issues.³⁰³

298 Radha Kumar, *Making Peace with Partition* (Penguin Books 2005) 110–18.

299 *ibid* 112.

300 Henry Cattán, *Palestine and International Law* (Prentice Hall Press 1973) 164. The author argues similarly for the Palestinians.

301 Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Harvard University Press 2003).

302 Kathleen P Lundy, 'Lasting Peace in Northern Ireland: An Economic Resolution to a Political and Religious Conflict' (2001) 15 *Notre Dame Journal of Law, Ethics, and Public Policy* 699, 700; Alfred McClung Lee, 'Insurgent and "Peacekeeping" Violence in Northern Ireland' (1972–3) 20 *Social Problems* 532, 535.

303 Anthony Carty, *Was Ireland conquered? International Law and the Irish Question* (Pluto Press 1996); Joseph Liechty and Cecelia Clegg, *Moving Beyond Sectarianism: Religion, Conflict and Reconciliation in Northern Ireland* (Columbia Press 2001); John McGarry and Brendan O'Leary, 'Consociation and Self-Determination Disputes: The Evidence from Northern Ireland and Other Recent Cases' in Keith Breen and Shane O'Neill (eds), *After the Nation? Critical Reflections on Nationalism and Postnationalism* (Springer 2010) 38–59.

In broad terms, the majority Protestants considered their identity akin to the British, whereas the minority Catholics considered themselves Irish. On the other hand, the people in Kashmir celebrate their cultural, religious, and linguistic diversity,³⁰⁴ which is the source of their cohesion rather than division. Bose also suggests finding a solution for the Kashmir issue within Indian democratic and self-governing institutions.³⁰⁵ On the other hand, Chari et al, argues that to maintain the inviolability of the Line of Control between India and Pakistan, it should be made into an international border,³⁰⁶ while Malik presents the situation in Kashmir merely as an Indo-Pakistani conflict.³⁰⁷

As far as the legal analysis of the Kashmir question by Indian scholars is concerned, it is often limited to analysis of the domestic laws related to Kashmir. Among the more conservative or mainstream writers, the focal point is that Kashmir is integral part of India.³⁰⁸ Pakistani writers like Hussain³⁰⁹ and Choudhry³¹⁰ oppose this interpretation and claim that Kashmir's accession was illegal. It is understandable why such literature has developed. Kashmiri scholarship remains focused on the politics,³¹¹ history,³¹²

304 Rushdie, (n 51) 57.

305 Sumantra Bose, *The Challenge in Kashmir- Democracy, Self-determination and a Just Peace* (Sage Publications 1997) 106.

306 Chari, et al (n 2).

307 Iffat Sana Malik, *Kashmir: Domestic Insurgency, International Dispute* (OUP 2002).

308 Anand, (n 65) 183; Paras Diwan, 'Kashmir and the Indian Union: The Legal Position' (1953) 2 *The International and Comparative Law Quarterly* 333; H.O. Agarwal, *International Law and Human Rights* (Central Law Publications 2004); S.K. Sharma and S.R. Bakshi (eds) *Kashmir the Constitutional Status* (Jay Kay Book House 1995); Jha, (n 13); Menon, (n 58) P Menon, *Transfer of Power in India* (Orient Longman 1997).

309 Ijaz Hussain, *Kashmir Dispute: An International Law Perspective* (Quaid-i-Azam University 1998).

310 Shabir Choudhry, *Kashmir and the Partition of India the Politicians and the Personalities involved in the Partition of India particularly in relation to the Position of Kashmir at the Moment of Independence on 15 August 1947* (M Phil Dissertation, University of Bradford, Postgraduate School of Studies in Social Sciences 1990).

311 S K Ganjoo, *Kashmir History and Politics* (Commonwealth Publishers 1998); B Singh, *Political Conspiracies of Kashmir* (Light of Life Publishers 1973); Prem Nath Bazaz, *Democracy Through Intimidation and Terror: The Untold Story of Kashmir Politics* (Heritage Publishers 1978); A Ganai, *Kashmir National Conference and Politics* (Gulshan Publishers 1984).

312 Prithivi Nath Kaul Bamzai, *A History of Kashmir, Political, Social, Cultural: From the Earliest Times to the Present Day* (Metropolitan Book Co 1962); Madhvi Yasin, *British Paramountcy in Kashmir 1876-1894* (Atlantic Publishers and Distributes 1984); A Kaul, (ed) *Justice J. Kilam: A History of Kashmiri Pandits* (Utpal Publishers 2003); F Hassnain, *Kashmir: The History of Himalayan Valley* (Gulshan Publishers 2002); Prem Nath Bazaz, *Kashmir in Crucible* (Pamposh Publications 1967).

freedom struggle,³¹³ partition³¹⁴ and the so-called autonomy granted to Kashmir.³¹⁵ Some international scholars discuss the Kashmir conflict from the perspective of the breakdown of democracy and the inception of separatism in Kashmir.³¹⁶

Methodology, Structure and Outline

Methodology: A multidisciplinary approach to the Kashmir question, looking at the issue from the standpoints of international law, history, politics, and diplomacy, broadens the scope and methods available for research. This study uses an integrated approach involving both conceptual and empirical analysis, and the methods used include archival/secondary data analysis, as well as doctrinal analysis and case studies. As such, this book uses interpretive, evidentiary, textual, comprehensive, and holistic approaches to research and findings. This multidisciplinary approach is used to acquire a better understanding of the legal, historical and political aspects of the Kashmir question. The aim of this study is to encourage scholars to understand the Kashmir question from a multidisciplinary perspective. The political practices and substantive laws relating to the dispute are both analysed. It is always understood that these remain separate but interrelated, particularly in situations involving recognition and in terms of finding solutions to international disputes. The historical narrative, especially regarding statehood, is the victim of diverse scholarly narratives. In order to resolve this difficulty, the present study meticulously evaluates archival literature to understand the correct nature of the relevant historical facts, particularly those that relate to the statehood of Kashmir. The archival research for this study was done in the UK (British Archives and British Library), India (Indian National Archives), and Indian Occupied Kashmir (Jammu and Kashmir Archives).

Structure: This book is divided into three major parts. The first part contains three chapters that introduce the reader to the history of Kashmir and

313 MY Saraf, *Kashmiris Fights for Freedom* (Fero Zoono Ltd 2005); R. Kaur, *Political Awakening in Kashmir* (APH Publishing Corporation 1996).

314 MG Chitkara, *Kashmir: A Tale of Partition* (A.P.H. Publishing Corporation 2002) vols I & II; T Singh, *Kashmir: A Tragedy of Errors* (Viking 1995).

315 H Ram, *Special Status in Indian Federalism: Jammu and Kashmir* (Seema Publications 1983); S Soz (ed), *Kashmir Crisis – Agenda for an Effective Dialogue, Selected Papers* (Kashmir Centre of Asian Studies 1993).

316 Widmalm, (n 16); Sumit Ganguly, 'Avoiding War in Kashmir' (1989–91) 69 *Foreign Affairs* 57, 72.

the key international law concepts that are explored in this book. The present chapter briefly introduces the reader to the central ideas and key concepts in the book. Chapter 2 reviews the history of Kashmir prior to and after 1947, taking an archival perspective. Chapter 3 presents the international law on the restoration of historical title and self-determination, as well as the major legal approaches to statehood/occupation within the international law literature. These first three chapters are of a particular significance to readers who are not familiar with the history of Kashmir and the particular areas of international law involved in the present discourse.

The second part of the book also contains three chapters. They aim to apply the international normative framework to the Kashmir question. Chapter 4 reviews the validity of the 1947 Instrument of Accession (IOA) from the perspective of archival materials, with a particular emphasis on the Foreign Office Legal Advisors' (Sir Gerald Fitzmaurice) legal opinion. Chapter 5 discusses the unlawful constitutional incorporation of Kashmir into the Indian Union and assesses this phenomenon in terms of human rights violations and unrepresentative government. Chapter 6 discusses the international community's legal position on the Kashmir question in order to determine the legal and political responsibilities that members of the international community have undertaken in terms of resolving the 70-year-old Kashmir dispute.

The third part contains one chapter and discusses the normative solution for resolving the Kashmir question, as well as providing a summary and conclusion on the findings relating to the major concepts and assumptions discussed in this book.

Outline: This chapter provides and analyses the contextual background of the Kashmir dispute, introduces the central and foundational concepts of the restoration of historical title and the right to self-determination, and briefly narrates the scope of this book. Chapter 2 analyses how Kashmir's statehood was lost and evaluates the history of Kashmir until the present, reviewing its status under *Dogra* and British rule, from the colonisation to the decolonisation of British India, as well as under Indian rule. Taking an archival perspective, the chapter also reviews the circumstances that surrounded the 1947 war between India and Pakistan, which led to the occupation and division of the Princely state of Kashmir. The Maharaja of Kashmir found himself forced into signing the Instrument of Accession with India against his will. The Instrument of Accession was, however, conditional to a plebiscite, but one has never been conducted. The chapter concludes that Kashmir was a functional political entity for at least a hundred years. The violence that has been continuing in Indian Occupied Kashmir for the last 70 years is an ongoing reminder of the

maladministration that occurred during the decolonisation of British India. The combination of all these factors has resulted in the loss of Kashmir's statehood. However, the Kashmiri people have kept their lost state alive with their secular and indigenous philosophy of *Kashmiriyat*.

Chapter 3 explores the longstanding debates in international law on the concepts of restoration of historical title and self-determination. The first part of the chapter explores the relationship between the restoration of historical title and illegal annexation, occupation, state continuity, recognition, statehood, and the right to self-determination. The chapter also reviews whether it is possible to claim 'identity without continuity'. The second part of the chapter analyses self-determination in the context of decolonisation and its applicability to the Non-Self-Governing Territories and abandoned European colonies occupied by a neighbouring contiguous state. The chapter also introduces the central tenets of self-determination and outlines its applicability in the post-colonial era from the perspective of the human rights covenants and the 1970 Friendly Relations Declaration. The third part of this chapter illustrates the interrelationship and application of the two key self-reliant principles: the restoration of historical title, and the right to self-determination in the occupied territories, and demonstrates that they enhance the case for independence.

Chapter 4 examines the applicability of the concepts of statehood, restoration of historical title, illegal use of force, occupation, state continuity, and decolonisation to the Kashmir question. It analyses Kashmir from the perspective of the substantive law on statehood, as well as the archival evidence on the British paramountcy over Kashmir. This chapter exposes the key problems with the legality of the Instrument of Accession, which is the basis upon which India claims title over Kashmir. It also discusses the effect of the unilateral statements and official legislation relating to Kashmir's independence. The legal provisions on the restoration of its historical title, self-determination, and archival documents are used to illustrate the nature of the illegal occupation of Kashmir and its entitlement to claim self-rule.

Chapter 5, following the external self-determination theme, examines the applicability of the 1970 Friendly Relations Declaration to the situation faced by the occupied Kashmiri people. The chapter focuses on the legality of the constitutional incorporation of Kashmir by India. The human rights violations, which are largely due to the presence of the unrepresentative Pro-Indian Government and the military might behind it, are also discussed. As the chapter demonstrates, the 1970 Declaration provides an additional ground for Kashmiris to claim their right to self-determination.

Chapter 6 explores the legal position that the international community has committed to through the Security Council and unilateral statements, as well as

the foreign policy of individual states, and shows why it is important for members of the international community to change their foreign policy to align it with their legal position. The chapter reviews the policy of bilateralism and support for the status quo that the international community has adopted for political reasons, and how such policies could have dangerous consequences in light of the escalation in tensions between India and Pakistan, both of which are nuclear powers, as well as the spread of terrorism and the persistent violations of the fundamental human rights of Kashmiri people in both India and Pakistan. As the chapter suggests, the Kashmir question today cannot be resolved without the assistance of the international community, which in fact dictates the outcome of claims concerning statehood.

Chapter 7 summarises the significant findings of this study and its contribution as a multidisciplinary analysis of the Kashmir question. As the chapter demonstrates, the substantive law on the restoration of historical title and the right to self-determination indeed strengthen the case for Kashmir's independence, which became extinct due to the Indo-Pakistani war of 1947 and its subsequent illegal occupation. The chapter also proposes a Security Council Resolution as a significant step towards finding a resolution to the Kashmir question. It also addresses the limitations of this study and acknowledges that the resolution of the Kashmir question is subject to the vast complexities of *realpolitik* concerns and, as such, cannot be solved without the international community's assistance. One area in which their assistance is vital is in persuading India to cooperate and negotiate on the Kashmir question in good faith. It is also important that Pakistan negotiates in with sincerity and without malice. These interventions should all aim to ensure that people of Kashmir can decide the future of their territory, which could also put an end to the ongoing violence in Kashmir and the 70-year animosity between India and Pakistan.

Kashmir – The Tale of a Lost Nation

Introduction

The purpose of this chapter is to *initiate a debate* on the Kashmir question by way of introducing and reviewing its history and legal status prior to and after 1947. This introduction will form a basis for further analysis in subsequent chapters of the Kashmir question from the perspective of the mainstream international law concepts of the restoration of historical title and the right to self-determination, which emancipated much of the colonised world. However, the history and theory of international law suggest that some of the normative content of these doctrines are comprised of the nineteenth-century classical lawyers' Eurocentric depictions of international law created for European interests at the expense of the colonisation of the underdeveloped Third World, who were depicted as oriental barbarians who needed civilizing through conquest.¹ Hence, legally-sanctioned European colonialism was perceived as being a mere consequence of the interaction between a European sovereign and a non-European entity, where the former was exercising its sovereignty and the state's liberty, neither of which the latter was deemed to possess.² Even post-colonial international law is perceived as being the principal language through which the domination of Third World continues, and it is expressed through globalisation. This is mainly because the powers of international financial institutions enforce a neoliberal agenda on Third World nations, compelling them to pursue the same social and economic policies.³ For a scholar from the periphery, such as me, reviewing the miscarriage of international justice in a Third World entity such as Kashmir, using an inclusive European liberal order that does not possess any determinate standards to govern its statehood is rather mystifying. It demonstrates the serious shortcomings of international law and the dehumanizing conduct of colonisers which lack

1 Bernard Röling, *International Law in an Expanded World* (Djambatan 1960) 29.

2 See generally, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Co. 1989) Ch 4.

3 BS Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3, 3.

moral accountability towards its Third World colonies.⁴ However, the truth remains that international law plays a constitutive role, and a peripheral scholar must become accustomed to the duality and double life of international law, as it is both an instrument of subjugation as well as possible liberation.⁵ As correctly argued by Chatterjee, scholars from the periphery cannot be for or against international law but can ‘only devise strategies to cope with it’.⁶

This study is an attempt to formulate an approach, rather than a definitive statement, towards the understanding of the Kashmir question from an international law perspective. This present chapter introduces the history of Kashmir and reviews the nature of its territory, government, people, and common culture of *Kashmiriyat* prior to its seizure by India and Pakistan.⁷ This chapter will also discuss the situation as it was after the seizure of Kashmir and the United Nations intervention, as well as the legal position of major regional actors, including India, Pakistan, and China. All of these countries have seized territory from Kashmir. The major part of the chapter will adopt a pragmatic approach in its narration. In the latter chapters, this factual background will assist in the conceptualization of Kashmir as a state within international law.

This chapter will start off with an analysis of the Dogra period, which is the most significant part of Kashmir’s history for the purposes of this study. This period marks the consolidation of territory, power, and sovereignty of Kashmir, that made it a well-defined political entity. The Dogras were repressive rulers. Nonetheless, a government did exist, and people had the right to change it through the exercise of their right to self-determination. With the start of the decolonisation process in the 1940s, the literature reveals that Kashmiris were confident that they would overthrow the repressive Dogra regime, and the anti-Dogra movement was in progress.

In modern times Kashmir’s people have a right to restore its historical title through the exercise of self-determination. Until 1947 Kashmir was a territorially well-defined, functional State that had existed for a hundred years before its seizure. This autonomous administrative unit was lost due to the turmoil of the civil war that broke out in 1947. The British decolonisation in

4 Jean-Paul Sartre, *Colonialism and Neocolonialism* (Azzedine Haddour, Steve Brewer & Terry McWilliams tr, Routledge 2001).

5 BS Chimni, ‘International Law Scholarship in Post-colonial India: Coping with Dualism’ (2010) 23 *Leiden Journal of International Law* 23, 23–24.

6 Partha Chatterjee, *A Possible India: Essays in Political Criticism* (OUP 1997) 280.

7 Fozia Nazir Lone, ‘From “Sale to Accession Deed” – Scanning the Historiography of Kashmir 1846–1947’ 7(6) (2009) *History Compass*, 1496–1508; Fozia Nazir Lone ‘The Creation Story of Kashmiri People: The Right to Self-Determination’ (2009) 21 *Denning Law Journal* 1.

the subcontinent was instrumental in creating a disorder that pushed Kashmir into the throes of an unending war: one that has continued for the last 70 years. The British pulled out from the subcontinent without fulfilling their legal obligations towards it, which became the root cause of the Kashmir dispute.⁸ In the circumstances of chaos and coercion, the Maharaja was forced to accede to India against his will. This was followed by the use of military force against Kashmir and resulted in its division, seizure, and constitutional incorporation, as well as human rights violations by India. The Security Council has passed as many as twenty resolutions, including the resolution on demilitarisation and a plebiscite in Kashmir, so that the people can determine their will. However, such resolutions were never accepted by India. The part of Kashmir that is under Pakistan (as discussed in the previous chapter) will not be discussed in detail because Pakistan has not denied the conduct of a plebiscite in Kashmir, nor constitutionally incorporated Kashmir into its state. However, it is important to be mindful of the fact that the people in POK are equally suppressed and have a right to self-determination.⁹

The History of Kashmir

Since ancient times, Kashmir has attracted a variety of invaders. It was also the principal invasion route to India, and Alexander of Macedon in 326 BC¹⁰ and some invaders from Central Asian tribes like the Scythians passed through Kashmir at various times. For centuries, the people of Kashmir had to live under the rule of a number of foreign dynasties, like the *Pandava*, *Maurya*, *Kashan*, *Gonandya*, *Karkota*, *Utpala*, and *Lohara*. Kashmiri history is generally divided into four periods: the early period of the Hindu kings, chronicled in the famous *Rajatarangini*;¹¹ the period of the Kashmir Muslims, known as the *Salatin-i-Kashmir*; the Mughal Period, known as the *Shahan-i-Mughlia*; and the

8 Alastair Lamb, *Kashmir: A Disputed Legacy 1846–1990* (OUP, Karachi 1991) 2.

9 Praveen Swami, *India, Pakistan and the Secret Jihad: The Covert War in Kashmir, 1947–2004* (Routledge 2006); Prem Shankar Jha, “The Rise of Kashmir’s Second “Intifada” (*The Wire*, 23 August 2016) <<http://thewire.in/61048/kashmir-uprising/>> accessed on 2 December 2016; Shamil Shams, ‘How free is Pakistan-administered Kashmir?’ (DW Made for Minds, 21 July 2016) <<http://www.dw.com/en/how-free-is-pakistan-administered-kashmir/a-19416247/>> accessed 19 March 2017.

10 Josef Korb, *Danger in Kashmir* (Princeton University Press 1954) 9.

11 Kalhana, *Rajatarangini* (MA Stein tr, Archibald Constable & Co. Ltd. 1900).

period of the *Pathans*, known as the *Shahan-i-Durani*.¹² The only trait that was common among these foreign sovereigns was the cruelty and oppression with which they ruled over Kashmir which has been aptly described by historians and scholars.¹³ For a period of six hundred years, from the eighth to the fourteenth century Kashmir, despite its exploitation, was relatively independent and flourishing. In the fourteenth century, Kashmir was invaded and conquered by Muslims and the population converted from Hinduism to Islam.¹⁴

It was during the reign of Rainchan Shah in 1323 AD that *Sufi* Islam started to flourish in Kashmir. The culture of *Kashmiriyat* started to develop during his reign. Hangloo writes about the usage of the term *Kashmiriyat* by a plethora of people in myriad situations, and questions whether it always means the same thing or whether it refers to different things at different times. He describes this local philosophy which emerged from the unique history and geography of Kashmir and was also influenced by many other philosophies including those of European, Persian, Chinese, and Indian, people.¹⁵ For him *Kashmiriyat* is 'a core culture of heretics'¹⁶ that did not allow any institutionalised religion to overwhelm it. This tradition was ingrained in the minds of ordinary Kashmiris through the Sufi conversions teachings of cultural heroes (such as *Lalleshwari*, *Haba Khatun* etc.) and the political philosophy of Sheikh Abdullah.¹⁷ In general parlance, it has been used to describe communality and harmony as an essential part of Kashmiri identity.¹⁸ The notion of *Kashmiriyat* is based on accepting distinctions, which becomes a basis to accommodate diversity. *Lalla-Ded* (also known as *Lalleshwari*), the thirteenth century Hindu Kashmiri mystic poetess of *Shaivite*¹⁹ sect describes the culture of *Kashmiriyat* in the following Kashmiri saying:

12 Walter R Lawrence, *The Valley of Kashmir* (Henry Frowde 1895) 179.

13 Vincent Smith, *The Oxford History of India* (Clarendon Press 1920) 176. See also generally, Ghulam Muhyi'd Din Sufi, *Kashir, Being a History of Kashmir* (Light & Life Publishers 1974).

14 Korbel, (n 10) 11.

15 Rattan Lal Hangloo, 'Kashmiriyat: The Voice of the Past Miscontstrued' in Nyla Ali Khan (ed), *The Parchment of Kashmir: History, Society and Polity* (Palgrave Macmillan 2012) 43.

16 *ibid* 47.

17 *ibid* 49.

18 *ibid* 37.

19 A sect of Hinduism devoted to the worship of the God *Shiva* as the Supreme Being. <http://www.oxforddictionaries.com/definition/american_english/shaiva> accessed 22 February 2017.

Shiv chuy thali thali rozaan, Mav Zaan Hyound ta Mussalman, Trukhay chukh ta panunuy paan parzaan, Ada Chay Saahibas Zaani Zaan.

Shiva [a Hindu deity] abides in all that is everywhere. *Do not discriminate between a Hindu and a Muslim.* Know thyself: that is true knowledge of the Lord.²⁰ (Emphasis added)

Throughout this period, the religious activity of the *Shaivites* and *Sufis*²¹ continued to flourish side-by-side and nourish the culture of Kashmir. A large part of the population converted to *Sufi* Islam, including the ruler, Rainchan Shah. The Muslim *Sufi* saint Sheikh-Noor-ud-din,²² whom Hindus revere as *Nand Rishi*, developed the school of Sufism in Kashmir, which is called *Rishi*. It is believed that Lalla-Ded influenced *Nand Rishi's* spirituality, hence creating the *Rishi* tradition of Islam.²³ Therefore, Sufism in Kashmir not only popularised Islam but also laid the humanist foundations for cultural harmony. The relationship between Hinduism and Islam in Kashmir may be seen as symbolic of pluralism.²⁴ Due to this unique association of these two religions, the culture of *Kashmiriyat* advanced, which allowed relative freedom of religion and philosophical beliefs. As Hinduism interacted with *Sufi* Islam, what emerged was a tradition with an objective understanding of beliefs, favouring mutual co-existence and universal brotherhood. Therefore, it could be argued that *Kashmiriyat* stands on the four pillars of democracy, secularism, social justice, and human rights.²⁵ These ideals have been eroded in recent times due to the

20 Kashmiri Saints and Sages quoted in Nyla Ali Khan, 'The Land of Lalla-Ded: Politicization of Kashmir and Construction of the Kashmiri Woman' (2007) 9(1) Journal of International Women's Studies 22, 25.

21 Sufism is the mystical and spiritual system of the Sufis. Sufis is a sect of Muslim ascetic mystics who in later times embraced pantheistic views. See Oxford Dictionaries, 'Sufism' <http://www.oxforddictionaries.com/definition/american_english/sufism> accessed 29 June 2016.

22 Aparna Tandon, 'The Need for Community Involvement in Preventing and Responding to Heritage Emergencies in Jammu and Kashmir' <http://archives.icom.museum/disaster_preparedness_book/country/taandon.pdf> accessed 30 March 2006.

23 Yasin Malik, *Our Real Crime* (JKLF Publication 1994) 103, 115; Prem Shankar Jha, *The Origins of a Dispute-Kashmir 1947* (OUP 2003) 17; Chithralekha Zutshi, *Languages of Belonging – Islam, Regional Identity and the Making of Kashmir* (Hurst Company 2004) 3.

24 Sten Widmalm, *Kashmir in Comparative Perspective – Democracy and Violent Separatism in India* (Routledge 2002) 33.

25 Roshan Paul, 'Reviving Ethics in Strife-Torn Kashmir' (Changemakers, June 2005) website <<http://www.changemakers.net/journal/300506/paul.cfm>> accessed 30 March 2006.

political usage of *Kashmiriyat* by different factions,²⁶ but the fundamentals remain important to Kashmiri culture.

The reign of Zain-ul-Abidin (1417 AD) is remembered as the happiest period in the history of Kashmir and is called the Golden Age.²⁷ His succession was marked by acts of liberality and magnificence.²⁸ The chief glory of this king was his tolerance towards the *Brahmans* (Hindus). The Mughal rule started in Kashmir in 1586 AD and during this period the beautiful Mughal gardens, pleasure palaces, and Chinar trees were raised in the valley. They built the route through *Pir Panjal* to India. From 1752–54 AD, Ahmad Shah Abdali of Afghanistan conquered Kashmir from the last Mughal ruler and ruled Kashmir oppressively. This was the worst and cruellest of all periods in the history of Kashmir. When this oppression became unbearable, Kashmiris turned for help to the rising power of a Sikh ruler, Ranjit Singh of Punjab. In 1819 AD, Diwan Chand, Ranjit Singh's General, accompanied by Raja Gulab Singh, ousted the Afghan rule in Kashmir. For his assistance, the Sikhs rewarded Gulab Singh with the territory of Jammu.

Maharaja Ranjit Singh of Punjab lost the second Sikh War against the British and was unable to pay the war indemnity. He was forced to forfeit the territory of Kashmir to the British. The territory of Kashmir came under the control of the British with the assistance of Maharaja Gulab Singh. The British government in turn sold Kashmir to the Dogra Maharaja Gulab Singh (1792–1857) for 750,000 Rupees [approximately £ 100,000] under the Treaty of Amritsar (TOA).²⁹ By this treaty, Maharaja Gulab Singh acknowledged the supremacy of the British government and, as a token to acknowledge this supremacy, had to annually present to the British government, 'one horse, twelve perfect shawl goats of approved breed (six male and six female) and three pairs of Kashmiri shawls'.³⁰ This treaty put the Maharaja Gulab Singh in the possession of all the hill country and its dependencies between the Indus and the Ravi, including the Ladakh, Gilgit, and Chamba.³¹

The TOA was unlike the treaties with the other Princely States because it did not make any provision for the appointment of a British Resident, leaving the

26 Khalid Wasim Hassan, 'Migration of Kashmiri Pandits: Kashmiriyat Challenged?' (The Institute for Social and Economic Change, Bangalore, Working Papers series 2010) 5.

27 Korbelt, (n 10) 11.

28 It was during his period that the magnificent palace *Zaina Dab* (twelve stories, each containing fifty rooms) was built. He also built many bridges and canals.

29 Treaty of Amritsar, 16 March 1846, art 3.

30 *ibid* art 10.

31 *ibid* art 1.

Dogra rulers with internal autonomy.³² The TOA made it clear that in case of any dispute between Maharaja Gulab Singh and any other neighbouring State, the British government would arbitrate and the parties would have to abide by the decision.³³ The effect, if any, this treaty would have on Kashmir and the conflict between India and Pakistan will be discussed in Chapter 4 in some detail. This treaty was the first step toward the consolidation of Dogra rule in Kashmir.

The newly created State of Jammu & Kashmir joined the rank of Princely States as a sovereign entity within the British Empire. In terms of political administration, it meant that the viceroy of India did not govern Kashmir. It was the ruler who was sovereign in all internal matters, with defence and foreign affairs being supervised by a 'political agent' of the British Crown as an overseeing power of 'paramount authority'. The British transferred some more powers to the Princely States after the mutiny of 1857, when Queen Victoria stated in a Proclamation of 1858 that, 'We desire no extension of our present territorial possessions...we shall respect the rights, dignity and honour of native princes as our own'.³⁴ It was only in 1928 that the 'Memorandum of the Indian States People' was ratified, which justified the interference in the Princely States to prevent any gross misrule.³⁵

Kashmir as a Buffer State

The Dogras were well aware of their crucial geographical location, which earned them a special status among the Princely States and helped them to derive political advantages from the paramount power. William Digby writes that Maharaja Ranbir Singh was quite aware of his critical location and that he described his position as a 'buffer' in 1876.³⁶ In Kashmir, unlike in any other Princely State, relations with the British were guided by a defence strategy. Czarist Russia and the Afghans worried the British the most. Russian currency was even confiscated from certain traders in Kashmir,³⁷ lest it invited the ghost of Bolshevism. Due to this threat, during Ranbir Singh's reign a political agent

32 Charles Umpherston Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries* (Foreign Office Press 1909), vol 11, 165–66.

33 Treaty of Amritsar, 16 March 1846, art 5.

34 VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans 1961) 9.

35 IOR/L/PS/20/F197: Memorandum of the Indian State People [BL].

36 William Digby, *Condemned Unheard: The Government of India and H.H. the Maharaja of Kashmir* – A Letter to the Rt. Hon. Sir Ughtred Kay-Shuttleworth (Indian Political Agency 1890) 8.

37 File No, 61/30-C of 1919, Kashmir Government Records, JKA (J).

was appointed in northern Kashmir (Gilgit and Baltistan) to report on the activities in the region. The pressure to appoint the resident in Kashmir had already started to build during the unfortunate Afghan war of 1878.³⁸ However, it became more evident in 1884 when the viceroy, Lord Ripon, argued that the appointment of the Resident was ‘called for’ both ‘by the need for assisting and supervising administrative reforms’ and to prevent disturbances on the Afghan frontier.³⁹

In 1889 the British, in order to strengthen the northern borders and conscious of the threat from Russia towards *Pamirs*, instituted the Gilgit Agency under their direct control.⁴⁰ During this time, the Gilgit Agency was under a diarchy in which matters of defence, foreign relations, and communications were concerns of the British, but the Maharaja had responsibility for civil administration through his governor or *Wazir-i-Wazarat*.⁴¹ On 7 February 1922, a political agent in Gilgit, Major D.L.R Latimer, in communication with the Secretary to the Government of India’s Foreign and Political Department stated that there was close contact between Afghanistan (Kabul), China, and Russia (Tashkent). It was reported that the threat of the incursion of Bolshevik revolution and communism could be felt as much in Kashmir as in any other part of the world.⁴² On 7 March 1922, in communication with Secretary to the Government of India, Latimer stated:

Having failed in the West through the efforts of the British and French, the Bolsheviks are now wishing to find the fresh field for their enterprise in the East and to subjugate Chinese Turkistan [*now Sinkiang*].⁴³ (Emphasis added)

An airfield was constructed in 1929 in Gilgit to make British rule more effective and defend the northern borders. In 1934, negotiations started between the British and Kashmir, resulting in the signing of the Gilgit Lease on 26 March

38 During this war control over the north-western boundaries of the empire became more urgent. See Digby, (n 36) 46.

39 Letter from the Government of India to the Secretary of State for India, dated 7 April 1884, Foreign Department (Secret E)/Pros May 1884/Nos. 354–7 [NAI].

40 Korbelt, (n 10) 13.

41 Lamb, (n 8) 57–8.

42 File No: 57- F (Secret) Government of India Foreign and Political Department; Subject: Gilgit Agency, Political Dairies from year 1922 to December 1923 [NAI].

43 *ibid.*

1935. The Gilgit *Wazarat* north of the Indus River and its dependencies was leased to the British for sixty years.⁴⁴

The Dogra Dynasty & the Consolidation of Territory & Power

The Dogras consolidated the territory of Princely State of Kashmir. Maharaja Gulab Singh, the ruler of Jammu, who received the territory from Sikhs, had already extended his rule by conquering the neighbouring territories of Ladakh in the east in 1834⁴⁵ and Baltistan (Skardu) in 1840. He acquired Kashmir through the TOA in 1846. He also administered the territory of Poonch, which was *Jagir* (fief) from his younger brother Dhyan Singh, who had received it from the Sikh ruler Ranjit Singh. All of these territories became a part of the Princely State of Jammu and Kashmir. Poonch was a Muslim majority territory and there were many skirmishes between Poonch Muslim inhabitants and Dogra rule in the 1830s. Gulab Singh, with great determination and extreme cruelty, suppressed these first revolts.⁴⁶ After the death of Dhyan Singh in 1843, Gulab Singh treated Poonch, Bhimber, and Mirpur as his own property, but was not able to control the territory. The sale of Kashmir included the Gilgit Agency, but the Dogra dynasty never succeeded in effectively governing it. In 1852, Dogra rule was terminated by a tribal rebellion. Maharaja Ranbir Singh (Gulab Singh's son) in 1860 recaptured Gilgit.⁴⁷ Finally, Maharaja Hari Singh controlled Poonch in 1936. Hence, the political map of the Princely State of Jammu and Kashmir was completed.

Simultaneous to the creation of the territory of Kashmir, the Dogras also consolidated power by framing laws, outlining the Jammu and Kashmir Constitution Act 1939,⁴⁸ raising an army, and signing treaties. Some of the laws that were passed are: the Laws Consolidation Regulation of 1872, Sir Pratap Jammu & Kashmir Laws (Consolidation) Act of Samvat 1977 (AD 1920), State Subject

44 IOR/R/1/1/2676: File 174-P (S)/1935 Fortnightly reports on the political situation in the Kashmir State for the year 1935[BL]; Amar Singh Chohan,, *The Gilgit Agency 1877–1935* (Atlantic Publishers & Distributors 1984) 219–10.

45 Lamb, (n 8) 7–8.

46 GT Vigne, *Travels in Kashmir, Ladakh, Iskardo, the Countries adjoining the Mountain-course of the Indus, and the Himalaya, North of the Punjab* (London 1842) vol 1, 241.

47 The TOA was vague about Maharaja boundaries in *Dardistan* (Gilgit, Hunza). Gilgit was a gateway to smaller States like *Hunza*, *Yasin*, *Punial*, *Ishkaman* and polities like *Chilas* and *Astore* (now in Pakistan after 1947). Further, Gilgit controlled access to Eastern Turkestan (now Sinkiang in China) Afghanistan and to the West.

48 Act XIV of Samvat 1996 (AD 1939).

Law 1927,⁴⁹ Ranbir Penal Code 1932,⁵⁰ Criminal Procedure Code 1932,⁵¹ Widow Remarriage 1932,⁵² Income-tax 1934,⁵³ Land Alienation 1938,⁵⁴ Sales of Goods 1939,⁵⁵ the Defence of the State 1939,⁵⁶ and Census Act 1940.⁵⁷ The Maharaja also added to the military corps, creating the Command 2nd Brigade, Imperial Troops (Head Quarters, Sarwari Jammu), No1 Kashmir Mountain Battery, Kashmir Lancers, 2nd K.R (Body Guards), 3rd K.R. (Raghunath) and Artillery Depot, and Infantry Depot.⁵⁸ The High Court was formed in March 1928 by the Maharaja under Order No 1 of Samvat 1985 (1928 AD), which continued to be the High Court of the State under the Jammu and Kashmir Constitution Act 1939. It was in 1934, through Regulation No1 of Samvat 1991, that the Legislative Assembly was formulated to associate the people into the State Administration. The Maharaja had the Board of Judicial Advisers⁵⁹ and a procedure for appeals under the Constitution.⁶⁰

During Maharaja Pratap Singh's reign, there was also an attempt to popularise the 'national anthem' for the State of J&K, which was composed in 1911 by C.J. Burnow. It was played as a substitute for the 'general salute' to receive the Maharaja on public occasions. In 1913, there was still an official struggle going on to make it recognisable to the State's subjects.⁶¹ In addition, a new coat of arms (emblem) was devised for the State, modified considerably from the one designed for it by the British for the purposes of the Imperial Assemblage of 1877.⁶² The Dogras were therefore always in the position to extend their jurisdiction over their people and territory. They were competent in all judicial, legislative, and administrative matters of the State.⁶³

49 Notification No. I-L/84 of 20 April 1927.

50 Act XXI of 1989 (1932 AD).

51 Schedule II of Act XXIII of 1989 (AD 1932).

52 Act XXIX of 1989 (AD 1932).

53 Act IX of 1991 (AD 1934).

54 Act V of 1995 (AD 1938).

55 Act II of 1996 (AD 1939).

56 Act XXI of 1996 (AD 1939).

57 Act III of 1997 (AD 1940).

58 List No: 1422: Kashmir Army List, 1st Maghar 1972. By Authority: Army Headquarters, Kashmir, Jammu (1915) [JKA (S)].

59 The Jammu and Kashmir Constitution Act 1996 (AD 1939), s 71.

60 *ibid* s 60.

61 OER, Political department, 1911, File no. 58/E-19 [JKA (J)].

62 Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights and the History of Kashmir* (Hurst & Company 2004) 175.

63 Francis A Mann, *Further Studies in International Law* (Clarendon Press 1990) 4.

The scene was set for a sovereign State, secure in the foothills of the Himalayas. The Dogra rulers were now in a position to sign international treaties. Some of the treaties which the Maharaja signed were the Treaty of Amritsar 1846 (with the British), the agreement with Tibet 1852,⁶⁴ Treaty of Kashmir 1870⁶⁵ (with the British), and the Gilgit Lease 1935⁶⁶ (with the British). These treaties related to the sovereignty of Kashmir and will be discussed in Chapter 4. Being autocratic rulers, the Dogras framed all the laws in a way that depicted their supremacy over the territory of Kashmir. The Maharaja, in principle, was the source of all powers and sovereignty. These laws were harsh on the subjects and that, as we will discuss, became the motivation for the political revolution within the State of Kashmir.

The Repressive Dogra Administration in Kashmir

Gulab Singh and his 'Dogra dynasty' ruled Kashmir for a hundred years as totalitarian autocrats, oppressing the people. Robert Thorp wrote that in Kashmir the gross injustice was such that it opposed the 'whole spirit of modern civilisation and is in direct opposition of every tenet of the religion we profess'.⁶⁷ In this regard Dr Elmslie states that:

The disgraceful oppression...of the people...disgraceful to us English, for we sold, literally sold, the country into the hands of its present possessors; and sold with it the flesh and blood of thousands of our fellow creatures, *sold them into perpetual slavery*.⁶⁸ (Emphasis added)

Elmslie writes that the Dogras economically oppressed Kashmiris, with half of their individual income going into the government treasury, including half of the grain and cattle produced.⁶⁹ The Maharaja's power used to filter through many channels, including through corrupt governors (*Hakim-i-Ala*), to the

64 SK Sopory, *Glimpses of Kashmir* (APH Publishing Corporation 2004) 213.

65 File No 167-Internal of 1931, Government of India, Foreign and Political Department; Subject: Export to Central Asia via Indian and the Leh Treaty Road of duty free foreign Manufactures [NAI].

66 IOR/R/1/1/2676: File 174-P (S)/1935 Fortnightly reports on the political situation in the Kashmir State for the year 1935[BL]; Amar Singh Chohan, *The Gilgit Agency 1877-1935* (Atlantic Publishers & Distributors 1984) 219-210.

67 Robert Thorpe, *Cashmere Misgovernment* (Longmans, Green, and Co. 1870) 66.

68 Margaret Duncan Elmsie and W. Burns Thomason, *Seedtime in Kashmir: A Memoir of William Jackson Elmslie* (James Nisbet & Co 1875) 76.

69 *ibid* 77.

general masses. During Maharaja Ranbir Singh's reign (1877–79), Kashmir was devastated by famine and disease. In this famine, about three-fifths of the population in Kashmir died,⁷⁰ with a heavy toll on Kashmiri Muslims. Lawrence observes:

It is a notorious fact that the Hindus of Kashmir did not suffer heavily. The Mussalmans [*Muslims*] attribute the immunity of the Pandits to the fact they were a privileged class, whose official powers enabled them to seize all available grain.⁷¹ (Emphasis added)

This famine alarmed the British and prompted a serious reconsideration of the colonial policy of non-interference in Kashmir. During Maharaja Pratab Singh's reign (1885–1925), a new British policy emerged vis-à-vis Dogra governance in Kashmir. According to this policy:

The principle of decency and tradition providing legitimacy would have to be complimented by the ideal of service and accountability...to possess political rights.⁷²

This policy is corroborated by the aforementioned Memorandum of the Indian States People, published in 1928. This Memorandum was prepared by the Butler Committee, which was appointed by the Secretary of State (Government of India) through a communiqué on 18 December 1927. The Memorandum reported on the relationship between the Paramount Power and the Indian States and made reference to the 1848 statement of Governor General, Lord Hardinge, who wrote:

If the aversion of a people to a prince's rule should by his injustice become so universal as to cause the people to seek his downfall the British government are bound by no obligation to force the people to submit to a ruler who has deprived himself of the allegiance by his misconduct... Lord Salisbury in his despatch on the *Gaekwar* Case observes, 'Incorrigible misrule is of itself a sufficient disqualification for sovereign power'.⁷³

70 Lawrence, (n 12) 215.

71 Henny Sender, *The Kashmiri Pandits – A Study of Cultural Choice in North India* (OUP 1988) 4.

72 Rai, (n 62) 132.

73 Memorandum of the Indian State People, (n 35).

According to this policy, the Maharaja's reign by Hindu descent was not enough to keep him in power; the ability to rule and fulfil his obligations towards his subjects was necessary. It is argued that this policy demonstrates that the British recognised the 'people's sovereignty' within the Princely State of Kashmir. This was followed by the appointment of a Resident in Kashmir, who would have virtual *carte blanche* authority.⁷⁴ The Resident was to act as watchdog, not only on behalf of the British government, but also the 'people at large'. This step was a necessary prelude for the implementation of wide-ranging reforms, such as the introduction of a lighter assessment of revenue to be collected, (preferably in cash) revision of the existing taxes and dues, and removal of all restrictions upon emigration.⁷⁵ The object of these measures was to serve the interests of the State subjects, which also became one of the sources of heightened political awareness among the Kashmiri Muslims.⁷⁶

On 17 April 1889, Maharaja Pratap Singh was dispossessed by the British government of his powers to govern Kashmir, although he was allowed to continue as the titular head of the State. According to the British government, this action was in the interest of the people.⁷⁷ It was only after 16 years, in 1905, that Viceroy Lord Curzon reinstated Pratap Singh's powers, and it was on the precondition of good governance. The Maharaja instead focused on the uplifting of Dogras and Kashmiri Hindus⁷⁸ and neglected the uneducated Muslim population. The Resident, on the other hand, was involved in filling the higher ranks of the State officialdom with 'alien' non-state subjects.⁷⁹ In making amends so as to conciliate the people and prevent unification of disaffected Kashmiri Muslims with Afghans in the north-west, the British government adopted a policy of encouraging the State Council to appoint Muslims to protect

74 Letter from the Secretary to the Government of India, Foreign Department, to the officer on Special Duty in Kashmir, 1 August 1884, reproduced in William Digby, *Condemned Unheard: The Government of India and H.H. the Maharaja of Kashmir* (Indian Political Agency 1890) 131.

75 For detailed list of reforms see Foreign Department (Secret E/Pros. October 1886/No 725 [NAI].

76 Rai, (n 62) 137.

77 Letter from the Government of India to the Secretary of State for India, 3 April 1889, reproduced in Digby, (n 36) 155–56.

78 Rai, (n 62) 140.

79 Letter from McMahon to Talbot, 8 July 1897, Foreign Department (Secret E/Pros. February 1898/nos. 183–286 [NAI].

their interests.⁸⁰ However, despite these changes, Muslims were still excluded from opportunities in employment and also suffered religious discrimination.

Towards the end of the Pratap Singh's rule (1885–1925) and during the reign of the last Maharaja of Kashmir, Hari Singh (1925–1947), there was a strong uprising against Dogra rule. This era witnessed a wave of awakening among the oppressed Kashmiri Muslims,⁸¹ who demanded respect and rallied behind the slogan 'State for State's People'.⁸² The main drive behind this was that Kashmiris were excluded from certain jobs and people from neighbouring Punjab and other places were preferred.⁸³ As the agitation started to gain ground during Maharaja Hari Singh's rule, he issued an order dated 31 January 1927 giving preference in matters of employment to the hereditary State subjects in government service. Some have claimed that his rule undermined the concept of *Kashmiriyat* itself.⁸⁴ This order was also massively significant to the national status of the people of Kashmir during the end of the British Empire, which will be discussed in Chapter 4. However, it did not make any difference to the plight of the State subjects of Kashmir. Bazaz writes that under Hari Singh's pro-Dogra policy:

The people of Jammu [*Dogri origin*] particularly the *Rajputs* got most of the big jobs while the Pundits were recruited as clerks in offices vacated by the Punjabis...Needless to say the Muslims were as yet out of the picture.⁸⁵ (Emphasis added)

The extent of communal discrimination was massive: Kashmiris (Non-Dogras) could neither possess firearms⁸⁶ nor seek employment in the army, unlike the Dogra people of Jammu. The discrimination directed against Muslims is sharply apparent in the Ranbir Penal Code of 1932,⁸⁷ which ruled that the slaughter of bovines would result in ten years of imprisonment, and the Criminal

80 Foreign Department (Internal E)/ Pros. February 1898/Nos. 183–286 [NAI].

81 William Pell Barton, *The Princes of India* (Nisbet & Co 1934) 127–28.

82 Ardarsh Sein Anand, *The Constitution of Jammu and Kashmir – Its Development & Comments* (4th edn, Universal Law Publishing Co. Pvt Ltd 2004) 24.

83 Prem Nath Bazaz, *The History of Struggle for Freedom in Kashmir* (Kashmir Publishing Company 1954) 135.

84 Nilanjan Raghunath, 'Jammu and Kashmir: Competing Concepts of Nationalism' (2006) 2(1) *The Yale Journal of International Affairs* 44, 50.

85 Bazaz, (n 83) 146.

86 State's Arms Act in *Jammu and Kashmir Administration Report* (1931) 6–10.

87 Act XXI of 1989 (1932 AD).

Procedure Code (1932 AD), which made the offence non-bailable.⁸⁸ As the oppression became increasingly intolerable, Kashmiri resistance grew.⁸⁹ In the 1930s, Hari Singh, in a bid to consolidate his power in Poonch, which was a Muslim majority territory, launched a decisive attack on the remaining Poonch autonomy. He made the Poonch courts subordinate to the J&K High Court, Poonch police were subject to strict State supervision, he strictly curtailed Poonch Raja's right to raise troops among his subjects, and Poonch was denied the right to levy its customs duties. These policies led to the uprising and later the Poonch revolt in 1947.

The events of 1931 awoke Kashmiris from the slumber of political ignorance, leading to a situation unlike those in any other Princely States. The uprising started with the goal of attaining self-determination (including both political and religious rights) against the Maharaja. It is to be noted that unlike in India, the Kashmir rebellion was not directed against British rule. This uprising was the result of the atrocities committed by the Hindu Dogra rulers on the Muslim majority population and the Dogra rulers channeling all the amenities to the privileged class of Hindu Pundits.⁹⁰ This revolution was a democratic fight against oppression by the oppressed and was largely secular in nature, as people from all the religions were involved. The Hindus, therefore, were part of the revolution of 1931.⁹¹

This movement was led by the vision of educated Kashmiris and social reformers and visionaries like Sheikh Abdullah and Prem Nath Bazaz. The educated Muslim youth started the Reading Room Party,⁹² which was used as a discussion forum.⁹³ They established contact with publishers like N.L. Banerjee in London, who was publishing the magazine called *Indian States*. Based on the information provided by the Reading Room Party, articles regarding the plight of Kashmiris started to appear in the outside press.⁹⁴ These people raised their

88 Schedule II of Act XXIII of 1989 (1932 AD).

89 File No: 131/Sp-13 Clue: Abdulla (Mr. S.M) Objectionable speeches delivered on 8 and 10 April 1937, in Jammu on cow killings [JKA (J)].

90 Rai, (n 62) 140; Lawrence, (n 12) 215; Sender, (n 71) 4.

91 Bazaz, (n 83) 147–150.

92 Muhammad Yusuf Saraf, *Kashmiris Fight for Freedom (1819–1946)* (Feroz Sons 1977) vol 1, 354–355.

93 Prem Nath Bazaz, *Inside Kashmir* (Kashmir Publishing Co 1941) 98.

94 Prakash Chandra, 'The National Question in Kashmir' (1985) 13(6) *Social Scientist*, 35, 53.

voice against the communal discrimination of the Maharaja, which led to the full-fledged agitation. The year 1931 also saw the emergence of a powerful political movement and gave birth to the only political party, the All Jammu and Kashmir Muslim Conference (also called the Muslim Conference), under the leadership of Sheikh Mohammed Abdullah. Its unambiguously anti-Dogra stance demanded economic, political and religious rights from the State.

All the Kashmiri people, including government employees, were involved in the agitation and insurrection to overthrow the State government. The Maharaja responded with brutal oppression. This led to the imposition of martial law in the State under the notification No 19-L of 1988 (1931 AD), under which special powers were conferred upon officers to arrest the people without warrants and on suspicion. During this period, thousands of people were imprisoned without trial. The special notification on the lines of the Burma Ordinance was also issued within Srinagar Municipal limits, authorising State military officers and police officers to exercise special powers under such notification.⁹⁵ People were not allowed to attend mosques, and Muslim newspapers like the *Siayasat*, the *Inqilab*, and the *Muslim Outlook* were banned.⁹⁶

On 13 July 1931, anti-government feelings turned into open violence. Large numbers of people were waiting outside the Srinagar Central Jail for the verdict on the case of Abdul Qadeer, who was arrested for anti-government speech.⁹⁷ The Governor ordered the mass arrest of the crowd and police opened fire on them.⁹⁸ Since then, 13 July is commemorated as the Martyr's day in the history of Kashmir, when the people of Kashmir died for the cause of freedom and dignity. The government believed that the agitators were working secretly to overthrow the government.⁹⁹ In Srinagar, a Notification under Section 144 Cr. P.C (Criminal Procedure Code) was issued to supplement the standing provisions of Notification No L-2, which prohibited meetings and processions in public places throughout Kashmir.¹⁰⁰

95 File No: 654 P (1931) Press Communiqué, 25 September 1931 (Srinagar) 17 [NAI].

96 *ibid*; Dy No. 340 P(C) of 31 (No. F. 12-C/31): Letter from Resident of Kashmir to Polindia (the Political Secretary to the Government of India, Foreign and Political Department, Simla), 10 August 1931 [NAI].

97 Muhammad Yusuf Saraf, *Kashmiris Fight for Freedom (1819–1946)* (Feroz Sons 1977) vol 1, 373.

98 *ibid* 376.

99 File No: 654 P (1931) Press Communiqué, 25 September 1931 (Srinagar) 17 [NAI] 11 & 12.

100 IOR/V/26/272/8: Report on an Inquiry into Disturbances in Kashmir in September 1931 [BL]. In violation of this proclamation disturbances spread in Kashmir; File No: 654

This was followed by the inquiry into the disturbances and events of September 1931, conducted by the Mr Middleton.¹⁰¹ This inquiry was conducted to cover the proximate and immediate causes of the riots and did not reflect on the administrative problems in the State.¹⁰² This report, therefore, was not of much help in addressing the political needs of the people. In the meantime, in order to suppress the agitation in Kashmir, the Maharaja received help from the government of British India, thus keeping up with the terms of TOA Article 9. During this time, troops were employed for the protection of Kashmir, like the Rifle Brigade at Jammu, Border Regiment at *Mirpur*, and 13th/18th *Hussars* for patrolling between Jammu and the Frontier.¹⁰³ There were many instances of police violations, like interference with the congregation in the Jammu Mosque during the prayers on the 27 November 1931.¹⁰⁴ During this incident, police actions resulted in a massacre.¹⁰⁵ The oppression of the Maharaja against the Muslims continued.¹⁰⁶

In 1932, Sheikh Abdullah was tried and convicted in the case of *State v. Sheikh Mohammad Abdullah & Others*. Abdullah was charged under sections 120A, 120B, 121, 122, 124A, and 153A of Ranbir Penal Code 1932. These sections charged him with criminal conspiracy, waging war against the government, collecting arms with an intention of waging war, sedition, promoting enmity, and acting in ways prejudicial to the maintenance of harmony. The charges read:

Conspiring to start a parallel government in the State, form[ing] a scheme for appointing all military and civilian officers, prescribe[ing] pays, uniforms, badges and ranks for such officers, arranging funds

P (1931) Press Communique, 25 September 1931 (Srinagar) 17 [NAI]; *The Statesman*, 26 September 1931 [NAI]; IOR/R/1/1/2155 (1): File 423(2)-P (S)/1931[BL].

101 IOR/V/26/272/8: Report on an Inquiry into Disturbances in Kashmir in September 1931 [BL].

102 *ibid.*

103 File No: 586-P 1931: Government of India, Foreign and Political Department (Political) Subject [NAI].

104 File No 663-P 1931: Political Secretaries Letter No 181 (A) M dated the 12 December 1931 addressed to the Secretary Department, India Office London [NAI].

105 IOR/1/1/2180, File 574(1)-P (S)/1931, Kashmir Disturbances; 2 November 1931 to 22 November 1931 [BL].

106 File No: 280/1989 (1932); Department: Ex-Governor Records; Subject: Complaints (miscellaneous) and enquiries thereof [JKA (S)].

for such purpose, make[ing] preparation for waging a war against the government...ignoring all together the laws of the land.¹⁰⁷

The outcome of the case was that Abdullah was jailed, but was subsequently released. However, the uprising and agitation was so strong that Kashmiris demanded an enquiry into their grievances, and claimed political, economic, and religious rights from the government of Kashmir.

When the Maharaja was unable to control the revolution, he announced that he would submit to the reasonable 'demands' and promised sympathetic consideration.¹⁰⁸ It was followed by the appointment of the commission under the Presidency of Sir B.J. Glancy to enquire into the grievances of *Mussalmans* and others, and to suggest modifications in the State administration.¹⁰⁹ The Commission submitted its report on 22 March 1932, suggesting that the violence was the result of various political and economic grievances. The report criticised the Kashmir government's tendency to privilege the Hindus and their claims to shrines.¹¹⁰ The Commission recommended increasing Muslim scholarships in education and employment in State services,¹¹¹ and to release political prisoners.¹¹² It led to the formation of the Kashmir Constitutional Reforms Conference, which later led to the creation of the Franchise Committee.¹¹³ On the basis of the recommendations of these committees, the Maharaja in 1934 enacted a Constitutional Act providing the establishment of a Legislative Assembly called '*Praja Sabha*', with legislative, executive and judicial powers.¹¹⁴

107 *ibid.*

108 Lord Christopher Bromhead Birdwood, *Two Nations and Kashmir* (Robert Hale 1956) 31.

109 IOR/V/26/272/8: Report on an Inquiry into Disturbances in Kashmir in September 1931 [BL]; File No: 13/22, Subject: Statement of Muslims presented to the Glancy Commission through Abdullah. 1931, Records, From 1922 A.D. to 1940 A. D [JKA (S)].

110 B.J. Glancy, *Report of the Commission Appointed Under the Orders of His Highness the Maharaja Bahadur, dated November 1931, to Enquire into Grievances and Complaints* (Ranbir Government Press 1932) 4 [BL].

111 *ibid* 19–25 [BL].

112 File No. 196/1989 (1932); Department: Ex-Governor Records [JKA(S)].

113 IOR/L/PS/20/F194: Report of the Franchise Committee Jammu: Govt of Jammu and Kashmir, 1934 [BL].

114 Regulation No. 1 Samvat 1991 (1934 AD).

The recommendations of the Glancy Commission failed largely because they were not implemented in their entirety.¹¹⁵ The agitation and repression continued in the 1930s¹¹⁶ and into the 1940s.¹¹⁷ In 1938, Sheikh Abdullah moved a resolution in the Working Committee of the Muslim Conference, suggesting the change of the name of 'Muslim Conference' to 'National Conference' and to open the doors to non-Muslims.¹¹⁸ This was said to be in keeping with the concept of *Kashmiriyat*.¹¹⁹ Mass meetings by Kashmiri people followed. The Maharaja became alarmed and issued a proclamation on 7 September 1939, promulgating the Jammu and Kashmir Constitutional Act.¹²⁰ The Act consisted of 78 sections and 5 Schedules, enumerating the powers of the executive, legislative assembly and judiciary, including the jurisdiction of the High Court.¹²¹

In 1940, the National Conference of Abdullah launched the new red flag with a plough, signifying a peasant revolt.¹²² In 1941, the Muslim Conference was revived by Ghulam Abbas. Both the Muslim Conference and National Conference intensified their political campaigns in Kashmir. In 1943, the Maharaja, faced with insurrection, issued orders to form the Constitutional Reform Commission to look into the safety, integrity, and security of the State to bring together all communities to develop the economy to increase representation of all State subjects in higher offices and stamp out corruption.¹²³

In 1944, the National Conference issued the 'New Kashmir Manifesto'¹²⁴ at their annual meeting. This manifesto included provisions for a constitution for Kashmir, as well as a national economic plan. It dealt with the issue of citizenship, national assembly, council of ministers, national language, guarantee of fundamental rights (including the freedom of speech, press and association),

115 Ref. IOR/R/1/1/2837, File 261-P (S)/1936 Activities of the All-India Kashmir Committee (1936–1937) [BL].

116 IOR/R/1/1/3149, File 482-P (S)/1938: Agitation in the Kashmir State (1938) [BL].

117 Majid A Siraj, *Kashmir: Desolation or Peace* (Minerva Press 1997).

118 All India State People's Conference, *Kashmir* (Bombay 1939) 19 [JKA (S)].

119 Hassan, (n 26).

120 Government of Jammu and Kashmir, *A Handbook of Jammu and Kashmir State* (3rd edn, Government of Jammu and Kashmir 1947) 35.

121 The Jammu and Kashmir Constitution Act 1996 (AD 1939), s 71.

122 IOR/R/1/1/3492, File 11(6)-P (S)/1940 Vol. 11 Fortnightly Reports on the Political Situation in the Kashmir, 1940–1941 [BL].

123 IOR/R/1/1/3913, File 1(32)-P (S)/1943: Appointment of a Commission to advise H.H. Maharaja of Kashmir on the question of Constitutional Reforms in the State (1943–1944) [BL].

124 Kashmir Bureau of Information (1948) *New Kashmir* (New Delhi) [JKA (S)].

and the justice system.¹²⁵ It was submitted to the Maharaja and he agreed to diarchy in the legislative assembly on 2 October 1944.¹²⁶ In 1946, Sheikh Abdullah made a speech and challenged the sovereignty of the Maharaja in Kashmir and started the 'Quit Kashmir' movement against him.¹²⁷ On 20 May 1946, the prominent members of the National Conference were arrested and Sheikh Abdullah was sentenced to three years' imprisonment, charged with sedition.¹²⁸

During 1940s, the National Conference and Muslim Conference actively participated in the political movement in Kashmir. The activities of these parties revealed the unrepresentative character of the Dogra administration. The constitutional reforms in Kashmir starting from the 1930s onwards, gave the people some opportunity to be part of a State administration,¹²⁹ though it was far from a representative government. The reforms also resulted in growing political awareness among Kashmiris. The Maharaja had started to make changes, which would have given Kashmir a representative government with an elected legislature. However, the changing political conditions in British India and the question of the accession of Princely States had far-reaching consequences in Kashmir.

The End of Empire: Impact of the Decolonisation Process on Kashmir

India, apart from being a captive market for Britain in economic terms, was of important strategic interest¹³⁰ to them. The year 1947 was one of the most defining moments in the history of the British Empire.¹³¹ Two new dominions carved out of British India were vying for assets and territory. Toward the end of the empire and in the transfer of power, the British had important obligations in determining the status of the Muslim minority in British India and

125 Kashmir Bureau of Information (1948) *New Kashmir* (New Delhi) [JKA (S)] s 6.

126 Government of Jammu and Kashmir, *A Handbook of Jammu and Kashmir State* (3rd edn, 1947) 37.

127 Bazaz, (n 83) 256.

128 *State v Sheikh Mohammed Abdullah*, Criminal Case No 1(A) of 2003, Quoted in National Conference, *Why Freedom?* (1946) 3 [JKA (S)].

129 Anand, (n 82) 50.

130 Henry Vincent Hodson, *The Great Divide- Britain-India-Pakistan* (OUP 1988) 3.

131 Siraj, (n 117) 37.

the position of Princely States. When the British government agreed to grant independence to British India, the question immediately arose as to the relationship between the Princely States and the new nations, once paramountcy was withdrawn.

At the time of the transfer of power, the status of the Princely States was seen as a fascinating controversy¹³² and lawyers, civil administrators, historians, and other writers had considerable bearing on the understanding of the claims from the Princes and the policy of the British government towards them.¹³³ The strong opinion, in view of the historical relationship between the paramount power and the Princely States, was that the latter should not be transferred to the new dominions without their consent.¹³⁴ However, the transfer of power from British India to sovereign India was brought to an end in haste. In this process, Kashmir inherited the complexities that were generated during the decolonisation and division of British India.¹³⁵ This will be discussed in the following sections. After independence, communal hostility exploded into violence on both sides of the new Indo-Pakistani border. The decolonisation and division of British India witnessed the largest transfer of population in the history of the world.¹³⁶

After the elections following the Second World War, Winston Churchill had to step aside and the Labour Party came to power in Britain. At this time Britain was on the verge of bankruptcy, and Prime Minister Attlee hence brought about change in the British policy toward India. On 19 February 1946 the Secretary of State for India, Lord Pethick-Lawrence, announced the Labour Party's decision to send a delegation of three Cabinet Ministers to India to find a solution to the Indian problem. The Cabinet Mission was also to forge a relationship between the native Princes and the Paramount Power. On 24 April 1946, the Mission arrived in Srinagar and Abdullah sent them a memorandum of appeal:

We wish to submit that for us in Kashmir re-examination of this relationship is a vital matter because a hundred years ago in 1846 the land and the people of Kashmir were sold...by the British...the people of Kashmir are

132 SDK Sen, *The Indian States, their Status Rights and Obligations* (Sweet and Maxwell 1930).

133 Hodson, (n 130) 28.

134 GS Chhabra, *Advanced Study in the History of Modern India* (Lotus Press 2007) 56.

135 The Government of India Act, 1935.

136 John McLeod, *History of India* (Greenwood Publishing Group 2002) 130; Maurice Cohen, *Thunder Over Kashmir* (Orient Longman Limited 1955) 1.

determined to mould their destiny and we appeal to the Mission to recognise the justice and strength of our cause¹³⁷...Today the '*national demand*' of the people of Kashmir is not merely the establishment of a system of responsible government but...'*absolute freedom*'.¹³⁸ (Emphasis added)

Sheikh Abdullah thereby declared his aim to achieve 'freedom'.¹³⁹ This was followed by the passing of the Cabinet Mission Memorandum of 12 May 1946. In paragraph five, the memorandum states that:

The rights of the State which flow from their relationship to the Crown will no longer exist...all the rights surrendered by the States to the Paramount Power will return to the States.¹⁴⁰

The provisions of the Cabinet Mission Memorandum were reiterated in the meeting of the Crown Representative (Lord Mountbatten) with the Chamber of Princes on 25 July 1947.¹⁴¹ There were three clear choices: accession to India or Pakistan, or to remain independent. The Viceroy Lord Mountbatten was also the Crown Representative in relation to the Indian States, and held responsibility for guiding them at a crucial moment in their history. However, surprisingly, in his address to the Chamber of Princes he said:

There is universal acceptance among the States of the Cabinet Mission memorandum of 12 May and when the political parties accepted the statement of 3 June they fully realised and accepted that withdrawal of paramountcy would enable the States to regain complete sovereignty...the draft instrument of accession...provides that the States accede to appropriate dominion on the three subjects...the instrument contains an explicit provision that in no other matter has the central government any authority to encroach on the internal autonomy or the sovereignty of the state...*and every wise ruler and wise government would desire to link up with the great dominion of India.*¹⁴² (Emphasis added)

137 Abdullah, *Opening Address to the Jammu and Kashmir Constituent Assembly*, 5 November 1951, 7.

138 Saraf, (n 92) 669.

139 Michael Brecher, *The Struggle for Kashmir* (OUP 1953) 35.

140 FO 371/84244: Validity of Kashmir's accession to India, 1950 [NAL].

141 *ibid.*

142 *ibid.*

It is therefore argued that Mountbatten's attitude was perhaps influenced by the fact that he would still be Governor General of India after the transfer of power. This future responsibility as Governor General demanded constitutional loyalty from him to uphold the security and welfare of India.¹⁴³ Hence, it is very difficult to imagine Mountbatten held an unbiased view about the accession of Kashmir to Pakistan, or the Maharaja's wish to stay independent.

In legal terms, the Cabinet Mission Memorandum and Crown Representative Address made it clear that with the withdrawal of paramountcy, all Princes were free to accede or remain independent.¹⁴⁴ It should be noted that this Mission for British India rejected the separate State of Pakistan, but recognised that Muslims and Hindus could geographically be separated.¹⁴⁵ Later, the Indian Independence Act of 18 July 1947 was passed to accommodate the creation of two new dominions: India and Pakistan.¹⁴⁶ This Act, along with the Government of India Act 1935, did not prejudice the option of the Princely States to form independent nations. The Cabinet Mission Memorandum 1946 and the Crown Representative Address (Lord Mountbatten) to Chamber of Princes in 1947 did not diverge from the Government of India Act 1935.¹⁴⁷

The Government of India Act 1935 was framed to govern the decolonisation process of British India and Indian States after the failure of the Simon Commission and Round Table Conferences in London.¹⁴⁸ According to this Act, British India was linked to the Indian States through Sections 1 and 6. Section 1 of the 1935 Act made it necessary that a certain number of the Princely States should accede to British India before the federal central government could be established there.¹⁴⁹ It was also essential that the rulers of Princely States should nominate 125 members of the prospective Federal Assembly.¹⁵⁰ This act also offered two choices to the Princely States: either to join India or to remain independent, as there was no idea then about the creation of Pakistan.¹⁵¹ In

143 Hodson, (n 130) 385.

144 Appendix II in Menon, (n 34).

145 David Butler, *Lord Mountbatten – The Last Viceroy* (Magna, Preston 1987) 14.

146 The Indian Independence Act 18 July 1947, Section 1(1).

147 Validity of Kashmir's accession to India, (n 140).

148 Hermann Kulke and Dietmar Rothermund, *A History of India* (4th edn, Routledge, 2004) 282.

149 The Government of India Act, 1935, s 1.

150 *ibid* s 6.

151 *ibid* sections 1 & 6.

answering a question in regards to the validity of the accession of Kashmir to India, Foreign Office Legal Adviser Sir G. Fitzmaurice stated:

According to the Government of India Act 1935 the Indian States were still under the paramountcy of the British Crown and the choice before an Indian State would have been that of accession or non-accession as there was only one dominion instead of two.¹⁵²

In the 1940s, the Muslim League leader Mohammad Ali Jinnah claimed a separate State for the Muslims of British India.¹⁵³ Jinnah introduced the 'Two Nations Theory', claiming a separate Muslim State to avoid their likely domination by the majority Hindus.¹⁵⁴ In March 1942, Sir Stafford Cripps came to India with certain proposals for the future set-up of India, but failed in his mission.¹⁵⁵

On 20 February 1947, the government of Britain announced that power would be transferred to Indian hands no later than June 1948.¹⁵⁶ Lord Mountbatten was appointed as Viceroy to facilitate a peaceful transfer of power to the new government of United India or the two governments of India and Pakistan. Mountbatten tried to negotiate with the leaders of the National Congress and the Muslim League to compromise on the formation of a United India. As no agreement was reached about who should receive power, he announced the 3 June 1947 plan for the transfer of power.¹⁵⁷ It also justified the division and setting up of the Boundary Commissions for the partition of Punjab, Bengal and Assam-Sylhet.¹⁵⁸ An establishment of the 'Boundary Commissions' to demarcate and allocate areas of Muslim Majority to Pakistan and vice versa followed the acceptance of Two Nation Theory by the National Congress and British government.¹⁵⁹ The Commissions were set up on 30 June 1947 headed by Sir Cyril Radcliffe, the British lawyer and Vice-Chairman of the English Bar

152 FO 371/69710: Foreign Office, Minutes, Mr. Fitzmaurice, 'Validity of Kashmir's Accession to India', 25 and 27 February 1948.

153 Stephen Cohen, *The Idea of Pakistan* (Brookings Institution Press 2004) 28; Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (CUP 1994) 7–34.

154 Mohammed Ali Jinnah, Speech at Lahore, March 22, 1940.

155 M Ramaswamy, 'Constitutional Developments in India 1600–1955' (1956) 8 *Stanford Law Review*, 326, 334.

156 Statement of Her Majesty's Government of 20 February 1947.

157 Quoted in AC Banerjee, *The Making of the Indian Constitution 1939–1947* (Calcutta 1948) 443 (as cited in MV Pylee, *India's Constitution* (S Chand & Company Ltd 1997).

158 Hodson, (n 130) 346.

159 Victoria Schofield, *Kashmir in the Crossfire* (Viva Books Pvt. Ltd 1997) 125; Lamb, (n 8) 103.

Council. He arrived in India on 8 July 1947¹⁶⁰ with the task to divide the provinces of Punjab in the West and Bengal in the East into Muslim and Hindu majority areas, to be added into appropriate dominions.

In order to decide the fate of the Sylhet district of Assam and the North West Frontier Province (NWFP) and in response to Mountbatten's 3 June 1947 plan, referendums were conducted in July 1947.¹⁶¹ Sylhet was included into the eastern wing of Pakistan with East Bengal¹⁶² after the referendum was conducted there and the people decided to join Pakistan. Likewise, the NWFP also decided to join Pakistan after a referendum. These referendums are important as they show that the process was not new in the Indian subcontinent. Rather, it was the policy in the Indian sub-continent to conduct referenda to clarify doubt as to the wishes of the people. Were plebiscites applicable options only for the British Indian territories, which were to be divided between India and Pakistan? Or was it extendable to Princely States like Kashmir? These questions will be discussed in Chapter 4.

In order to accommodate the creation of Pakistan legally, the Indian Independence Act 1947 substituted certain provisions of the Government of India Act 1935, providing for matters consequential to or connected with the setting up of new dominions.¹⁶³ The Act created the two independent dominions of India and Pakistan, and also ended all the treaties and agreements in force at the date of the passing of this Act between His Majesty's Government and the rulers of the Indian States.¹⁶⁴ This Act increased the accession options for Princely States from one dominion to two. Section 7(1)(a) stated that from the appointed day, 15 August 1947, the government of Britain would have no responsibility for any government of any of the territories that were included in British India before that day.¹⁶⁵ This provision raises an important question as to the position of the British government with regard to the Princely States that did not accede to any of the dominions before or on 15 August 1947. This point will be argued in detail in Chapter 4.

These fully empowered States had the option to join either dominion by signing the Instrument of Accession and conceding the powers of defence,

160 Hodson, (n 130) 347.

161 Bidyut Chakrabarty, 'The Hut and the Axe: The 1947 Sylhet Referendum', (2002) 39 *Indian Economic Social History Review* 317, 317.

162 Ramaswamy, (n 155) 335–36.

163 The Government of India Act, 1935, Preamble.

164 *ibid* s 7 (1) (b).

165 *ibid* s 7 (1) (a).

external affairs, and communications. In the weeks before independence the Indian Deputy Prime Minister, Sardar Valabhbhai Patel, who was in charge of the State Department, successfully convinced the princes of most States to accede to India.¹⁶⁶ Three princes, however, refused to make such a choice and on 15 August 1947, the Princely States of Hyderabad, Junagadh, and Kashmir became independent. In all three cases, their refusal to accede to one country or the other before independence resulted in serious political clashes between India and Pakistan. The State of Hyderabad in the South of India, with an 85 percent Hindu population, decided to remain independent. India did not accept this and in September 1948 invaded it and forced the ruler to join India. This gave India absolute hold over the last holdout in what had been Hindu India.¹⁶⁷ However, Junagadh State on the south-western end of Gujarat linked to Pakistan through the Arabian Sea, also had an over 80 percent Hindu population. However, its Muslim ruler (*Nawab*), Mahabhat Khan, acceded to Pakistan in September 1947. India attacked Junagadh and conducted a plebiscite in February 1948 and the Hindu population voted for unification with India. Therefore, the Junagadh accession was transferred to India through a plebiscite.

The cases of Hyderabad and Junagadh are significant in at least two ways for Kashmir. Keeping in view the forceful annexation of Hyderabad by India, its claim of Kashmir on the basis of secularism appeared to be a farcical political philosophy. It is interesting to note that India disliked the Two Nation Theory of Jinnah,¹⁶⁸ which it later on applied to annex Hyderabad. It is argued in view of Hyderabad's annexation that the division of British India on a communal basis actually appealed to the pseudo-secular mind-set of the Congress, which they stretched to apply to the Princely States. As far as the Junagadh case is concerned, it shows that the conduct of a plebiscite was not new in the sub-continent to resolve territorial disputes and it was an available option for Kashmir even before the UN was involved. This case readily explains that the history of the Indian sub-continent shows that plebiscites were used to consult the people on their wishes. Such a consultation was utilised despite the ruler's preferences, as in the case of Junagadh, who decided to join Pakistan.¹⁶⁹

Kashmir became a bone of contention because of its strategic location and geographic contiguity with both India and Pakistan. Additionally, Kashmir's

166 McLeod, (n 136) 129–30.

167 *ibid* 130.

168 Krishna Kant Misra, *Kashmir and India's Foreign Policy* (Chugh Publications 1979) 386.

169 Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (2nd edn, I.B. Taurus 2003) 62.

large mineral and timber resources attracted both new countries.¹⁷⁰ The British retreated and abandoned Kashmir, which was their responsibility under Section 7(1) (a) of the Indian Independence Act 1947. In that context, Kashmir was a European-abandoned colony that may have been entitled to non-self-governing-territory status. This aspect will be discussed in Chapter 4.

Kashmir at the Crossroads: Invasion and the *De Facto* Division of Territory

October 1947 was likely a frustrating time for the Maharaja of Kashmir. He had to simultaneously deal with the internal demands of the local parties (the National Conference and Muslim Conference), the Poonch revolt, and pressures from the heads of governments of India and Pakistan (as well as Lord Mountbatten) to accede to one country or the other. In order to calm the people in Kashmir, state elections were held in January 1947, which the National Conference boycotted. By then, news of accession had already reached Kashmir and political parties had started to express their points of view. The Muslim Conference took part in the elections and won 15 seats in the assembly, though most of the leaders of both parties were in prison. In early June, the leader of the Indian National Congress and the first Prime Minister of India, Mr Nehru, expressed his wish to visit Kashmir to obtain the release of his friend Abdullah, the leader of the National Conference.¹⁷¹ Hodson argues that Nehru focused on the release of Abdullah because he viewed the National Conference as the counterpart of the Congress in Kashmir and sought to support its popular movement.¹⁷² It is argued that India, through the Indian National Congress, was internally making inroads into Kashmiri politics in order to establish the pro-Indian base by supporting the National Conference. Both Gandhi¹⁷³ and Nehru were anxious that the Maharaja should not make a declaration of independence.

This was followed by Lord Mountbatten's arrangement with the Maharaja and the Prime Minister of Kashmir, Pandit Kak, to visit Kashmir between 18

170 Larry H Miller, 'The Kashmir Dispute' in Lawrence Scheinman & David Wilkinson (eds), *International Law & Political Crisis – An Analytic Casebook* (Little Brown and Company 1968) 43.

171 Hodson, (n 130) 383.

172 *ibid.*

173 Ex-member of National Congress, later father of the nation, who towards the end of the Empire did not hold any governmental office.

and 23 June 1947.¹⁷⁴ On 19 July 1947, the Muslim Conference passed a resolution expressing their wish that Kashmir should accede to Pakistan.¹⁷⁵ Abdullah, the National Conference leader, supported independence but was in jail. On 24 August 1947, the leader of Muslim League, later the Governor General of Pakistan, Mohammad Ali Jinnah, expressed his wish to visit Kashmir. He sent his British Military Secretary Colonel William Birnie to Kashmir to arrange for a visit but Maharaja Hari Singh of Kashmir refused his request.¹⁷⁶

Aware of the dangers from the newly formed dominions, the Maharaja of Kashmir, on the proposal of the new Prime Minister of Kashmir, Janak Singh, and advice of Lord Mountbatten, considered entering into the Standstill Agreements with them. These agreements were to continue the 'existing arrangements' pending the settlement of details.¹⁷⁷ This arrangement was to give some time to the Maharaja to make up his mind as to accession. The Standstill Agreement of Kashmir with Pakistan was settled through telegrams dated 12 and 15 August 1947. After 15 August 1947, the government of Pakistan ran the post office and telegraphic services in Kashmir. This arrangement was to continue, pending the settlement of details and formal executions of fresh agreements.¹⁷⁸ As far as India was concerned, they asked the Kashmiri government to send the authorised person to Delhi to negotiate such agreements¹⁷⁹ and delayed the matter. Alastair Lamb argues that no such official was ever dispatched for this purpose and no Standstill Agreement was concluded.¹⁸⁰ The effect of the presence of the telegraphic Standstill Agreement between Kashmir and Pakistan on the validity of Instrument of Accession will be discussed in Chapter 4.

By that time the Radcliffe Commission had already allocated the Muslim-majority area in Punjab, *Gurdaspur*, to India, which became the only land access from India into Kashmir. In this connection, Schofield believes that this

174 Hodson, (n 130) 383.

175 Quoted in Resolution Adopted by the All Jammu and Kashmir Muslim Conference, 19 July 1947 (as cited in Sardar M Ibrahim Khan, *The Kashmir Saga* (Ripon Print Press, Kashmir 1965) 27).

176 Larry Collins & Dominique Lapierre, *Freedom at Midnight* (Granada Publishing Limited 1975) 401.

177 'Standstill Agreement with India and Pakistan' in Verinder Grover (ed), *The Story of Kashmir: Yesterday and Today* (Deep & Deep Publications 1995) vol 3, 76.

178 K Sawar Hasan (ed), *The Kashmir Question – Documents on the Foreign Relations of Pakistan* (Pakistan Institute of International Affairs 1966) 43.

179 *ibid* 44.

180 Lamb, (n 8) 121–22.

action manifested the intentions of Mountbatten to help the merger of Kashmir into India.¹⁸¹

While Maharaja Hari Singh was toying with the idea of an independent country¹⁸² the Poonch revolt, simmering from 1930s, turned into an open civil war in 1947. It was the result of the Maharaja's brutal policies, like the infliction of high taxes on the Muslims of Poonch. On 14 August 1947, people throughout the valley were celebrating 'Kashmir day' and the Poonchies came out displaying Pakistani flags.¹⁸³ Hari Singh imposed martial law and used all his might to terrorise the population and killed them ruthlessly. Houses were gutted and burnt. It is said that the flames were visible hundreds of miles away in the *Murree* hills of Pakistan.¹⁸⁴

The news of atrocities instigated the *Pathan* tribesmen from the North West Frontier Province (NWFP) to come to the assistance of Kashmiris. It is important to reiterate that the NWFP was a semi-autonomous region of British India before it became part of Pakistan. It was, (and remains) inhabited by Tribal *Pathans* called *Kabailis*, whom the British found difficult to control. In return for their goodwill, the British had to spend ten million dollars a year as subsidies to tribal chiefs. This province has borders with Afghanistan on the West and Kashmir on the East, and after partition it became a part of Pakistan.¹⁸⁵ The Hindu repression of Muslim Kashmiris became the call for a Holy War or *Jihad* for them,¹⁸⁶ and on 22 October 1947, they entered Kashmir.

By the fourth day of the invasion, 26 October 1947, they swept into Baramulla¹⁸⁷ which is on the outskirts of Srinagar, and this alarmed the Maharaja. This incursion by the tribesmen made history and changed the political conditions in Jammu & Kashmir. Maharaja Hari Singh, with his officers, fled from Kashmir to Jammu¹⁸⁸ and asked the government of India to intervene. India refused to help without the Maharaja signing the Instrument of Accession.

181 Schofield, (n 159) 128.

182 William W Baker, *Kashmir, Happy Valley, Valley of Death* (Defender's Publications 1994) 21; GM Shahidul Alam, 'Peacekeeping without Conflict Resolution: The Kashmir Dispute' (1982) 6 Fletcher Forum 62.

183 Alastair Lamb, *Birth of a Tragedy – Kashmir 1947* (Roxford Books, Hertingfordbury 1994) 61, 62.

184 Siraj, (n 117) 43.

185 Korbelt, (n 10) 74.

186 Collins, (n 176) 403.

187 Korbelt, (n 10) 76.

188 Cecil Earle Tyndale Biscoe, *Tyndale-Biscoe of Kashmir – An Autobiography* (Seeley Service & Co. Ltd 1951) 272.

On 26 October 1947, the Maharaja wrote a letter to Mountbatten¹⁸⁹ seeking help, and also allegedly signed the Instrument of Accession to provide the legal framework for India's action.¹⁹⁰ In his letter, he also expressed his intention to install Abdullah as the head of the interim government in the emergency situation to work with the Prime Minister of Kashmir.¹⁹¹ The circumstances under which the Maharaja signed the Instrument of Accession suggest that it was concluded under duress, the legal consequences of which will be discussed in Chapter 4.

Lord Mountbatten wrote a letter provisionally accepting accession and making it clear that it was the policy of India to conduct a plebiscite where an accession is a subject of dispute. He promised, on behalf of the government of India, to decide the question of state accession 'by a reference to the people'.¹⁹² Similarly, the Prime Minister of India, Nehru, reiterated promises of an impartial plebiscite.¹⁹³ The accession was conditional to a plebiscite and limited to defence, communications, and external affairs.¹⁹⁴

On the morning of 27 October 1947, troops from the First Sikh Battalion were airlifted to Srinagar under the command of Lt Colonel Dewan Ranjit Rai. This started the war between India and Pakistan, in which British officers were in command of armies at the highest level on both sides.¹⁹⁵ There is much controversy as to the exact dates on which the Instrument of Accession was signed and when the army was airlifted into Kashmir. These events have a direct influence on the legality of the Instrument of Accession and the war of 1947. In this regard, Lamb writes, 'It is at this point that the hitherto established narrative diverges dramatically from the facts'.¹⁹⁶ The Attorney General in the

189 FO 371/129775: Letter dated 26 October 1947 from Maharaja of Kashmir to the Governor-General, Lord Mountbatten [NAL].

190 The Instrument of Accession of Jammu and Kashmir State, 26 October 1947.

191 Mss Eur F164/25a: Kashmir before Accession 1948. [BL] and FO 371/129775: Letter dated 26 October 1947 from Maharaja of Kashmir to the Governor-General, Lord Mountbatten [NAL].

192 FO 371/129775: Letter Dated 27 October 1947 from the Governor-General of India, New Delhi to Maharaja of Jammu and Kashmir; P L Lakhanpal, *Essential Documents and Notes on Kashmir Dispute* (International Books 1965) 57; A Bhattacharjea, *Kashmir: The Wounded Valley* (UBS Publishers 1994) 150.

193 Telegram from Jawaharlal Nehru, Prime Minister of India to Mr Clement Attlee, Prime Minister of UK dated 26 October 1947 and to Liakat Ali Khan Prime Minister of Pakistan, dated 27 October 1947.

194 Schofield, (n 159) 148.

195 Cohen, (n 136) 3.

196 Lamb, (n 183) 96.

Attlee government, Sir H. Shawcross, also showed the long-lasting legal implications of the Instrument of Accession, keeping in view the Standstill Agreement that seemed to still be extant.¹⁹⁷ The legality of the Instrument of Accession, along with the questions such as whether the promise of plebiscite by Mountbatten represented the British policy or Indian policy or both, and if the Maharaja had the choice of independence, will be discussed in the Chapter 4. The accession was followed by the India and Pakistan War, which started on 27 October 1947,¹⁹⁸ and resulted in the displacement of thousands of people.¹⁹⁹ The legality of this war will also be discussed in Chapter 4.

In 1948, India lodged a complaint against Pakistan at the United Nations Security Council pursuant to Article 35 of the UN Charter. India's complaint was that Pakistan was aiding the invaders, who were nationals of Pakistan, and were committing aggression in Kashmir.²⁰⁰ Pakistan, in their counter-claim, denied these charges and questioned the legality of Kashmir's accession to India. The Security Council intervened and the ceasefire line was formed in 1949, later renamed the Line of Control.²⁰¹ The Security Council passed as many as twenty resolutions, including the resolution on demilitarisation and a plebiscite in Kashmir, so that the people's will could be determined.²⁰² For this purpose, the Security Council formed the United Nations Commission for India and Pakistan (UNCIP), which passed two resolutions on the situation in Kashmir. Both these UNCIP resolutions reinforced the Security Council resolutions, focussing on the negotiations on demilitarisation and the conduct of a plebiscite.²⁰³ The legal effect of these resolutions under international law will be analysed in Chapter 6.

These resolutions were not implemented due to India's evasion, which was supported by the Soviet Union's veto. Therefore, the ceasefire remains the only success that the United Nations has achieved with the Kashmir conflict. The truce contracts resulted in the formation of the Line of Control dividing Kashmir between India and Pakistan, each considering the other to be in illegal occupation of Kashmir's territory. The Security Council also passed two

197 Lamb, (n 8) 150.

198 Majid A Siraj, *Towards Peace in Jammu, Kashmir and Ladakh* (Manas Publications 2003) 45–46.

199 Sender, (n 71) xiv.

200 S/628 of January 2, 1948.

201 The Line of Control was established as a *de facto* border between India and Pakistan under the Simla Agreement 1972.

202 UNSC Res 47 (1948) SCOR, 3rd Sess UN Doc. S/726.

203 UNCIP Res (13 August 1948); UNCIP Res (5 January 1949).

resolutions calling Kashmir's integration by India into its union illegal.²⁰⁴ The detailed discussion on the legal position of the United Nations and the international community will be carried out in Chapter 6.

The Security Council again became involved in 1965 and 1971, when India and Pakistan fought more wars. The Tashkent Agreement was signed on 10 January 1966, between the Prime Minister of India and the President of Pakistan, and witnessed by the Chairman of the Council of Ministers for the USSR²⁰⁵ and resulted in withdrawal of troops on 25 February 1966. It was a settlement to the second conflict over Kashmir and represented its key achievement. The disengagement from battle from two sides, though some have argued that this achievement has been exaggerated and was rather the result of political convenience,²⁰⁶ has also been described as a way to bypass the UN process.²⁰⁷ The 1971 war between India and Pakistan resulted in the creation of Bangladesh.²⁰⁸ Under the Simla Agreement,²⁰⁹ it was decided that the two countries would settle their differences by peaceful means through bilateral negotiations mutually agreed upon between them.²¹⁰ However, T N Kaul, who was present at the Simla Agreement, wrote that at Tashkent Zulfikar Ali Bhutto (Foreign Minister for Pakistan) said that Kashmir was the root cause of their differences and had wanted a settlement, but that at Simla he had said that as he was now leading a 'defeated' nation, any concession on Kashmir would be seen as giving into pressure.²¹¹ In any case, these agreements started the policy of bilateralism over the Kashmir issue from the international community as well, although it did not take the form of any Security Council resolution. The United Nations did not seek a role as a mediator but never retracted from its declaration of the right of the Kashmiri people to a plebiscite to determine their will.

A parallel can be drawn with East Timor, where the United Nations confirmed the East Timorese right to self-determination following the 1975 Indonesian use of force. However, the support for an independent East Timor

204 UNSCR 91 (30 March 1951); SCR 122 (24 January 1957).

205 Altaf Gauhar, 'The Tashkent Declaration' (1966) 19 *Pakistan Horizon* 13, 13.

206 Michael Edwardes, 'Tashkent and After' (1966) 42 *International Affairs* 381, 381.

207 Farzana Shakoor, 'UN and Kashmir' (1998) 51(2) *Pakistan Horizon* 53, 53.

208 Sumit Ganguly, 'Wars Without End? – The Indo-Pakistani Conflict' (1995) 541 *Annals of the American Academy of Political and Social Science* 167.

209 The Simla Agreement, 2 July 1972.

210 *ibid* at para 1(ii).

211 Quoted in TN Kaul writing in the *Sunday Times of India*, 17 October 1993 (as cited in Schofield (n 169) 118).

receded and no resolution was passed after 1982 that called for the non-recognition of the integration of East Timor into Indonesia.²¹² Bilateralism and the individual foreign legal policy of the permanent members that contribute to the non-resolution of the Kashmir question will be reviewed in Chapter 6. At this stage, it is sufficient to point out that both India and Pakistan's foreign policy is guided by the Kashmir issue. They have both embraced policies with third countries that favour them against the local enemy,²¹³ for instance when India developed friendly relations with the USSR to counter Pakistan's relations with China and America.

India fought another war with China in 1962, resulting in China's annexation of an area in northern Ladakh called Aksai Chin, which had been under Indian occupation. Keeping up with their acrimony, Pakistan ceded northern Kashmir to Beijing in 1963.²¹⁴ The Chinese government considered this area strategically important because it provided an overland connection between Xinjiang and Tibet. Pakistan ceded the Trans-Karakoram Tract, considered to be of strategic importance, to China and it is now a part of Xinjiang. Article VI of the 1963 Agreement affirms that after the settlement of the Kashmir dispute, the sovereign authority in Kashmir would reopen negotiations with China on this boundary. In 2012 China repaved the Xinjiang-Tibet national highway, which traverses the disputed area of Aksai Chin, a strategic location for trade and transit between Tibet, Ladakh and East Turkestan.²¹⁵ For China, the Western sector border dispute over Aksai Chin is settled and considered to be a 'closed chapter',²¹⁶ though India disagrees.

Nehru, who before Indian independence advocated an end to the cold war conflict between the superpowers, found it impossible to reach an agreement with Pakistan over Kashmir or with China over the borders of Kashmir.²¹⁷ Hence, India and Pakistan were sucked into the vortex of nuclear power politics. Both countries stunned the world when they carried out nuclear tests in May 1998. Both retain nuclear power outside the Comprehensive Test Ban

212 Christine Chinkin, 'The East Timor Case (Portugal v. Australia)' (1996) 45 *The International and Comparative Law Quarterly* 712, 713.

213 Hodson, (n 130) 568–69.

214 Nick Easen, 'Aksai Chin: China's disputed slice of Kashmir', (*CNN*, 24 May 2002).

215 Senge H Sering, 'China Builds Dam on Indus near Ladakh', (2010) 4(2) *Journal of Defence Studies* 136.

216 Ananth Krishnan, 'Month after border talks, Chinese paper says Aksai Chin is a closed chapter', (*The Hindu*, February 16 2012) <<http://www.thehindu.com/news/international/month-after-border-talks-chinese-paper-says-aksai-chin-is-a-closed-chapter/article2897629.ece>> accessed 15 July 2016.

217 Stanley Wolpert, *India* (University of California Press 1991) 233.

Treaty and Nuclear Non-Proliferation Treaty, which oblige nuclear powers not to transfer their nuclear technology to other countries.²¹⁸ On 21 February 1999, both of the countries signed the Lahore Declaration, which aimed to build a positive relationship and reduce the chances of conflict between the two countries. However, the Kargil War followed it in the same year. The effect of the threat of a nuclear war as a factor in the Kashmir case will be discussed in Chapter 6

From 1989, the political repression committed by India against the people of Kashmir resulted in an open insurrection, claiming *Azadi* or independence from the Indian occupation. This insurrection was mostly the result of monopolised political space in Kashmir and the import of draconian policies of India with the connivance of the local nominated government since 1947. The people of Kashmir lost faith in this political system,²¹⁹ which was undemocratic and corrupt. In this backdrop of political crisis, the Kashmir liberation movements took a violent dimension²²⁰ and the population of Kashmir resorted to insurgency. In order to curb this popular demand for self-determination, India launched its counter-insurgency operations²²¹ and adopted gruesome approaches²²² resulting in disappearances, torture, extra-judicial killings,²²³ and the displacement of thousands of Kashmiri people,²²⁴ and have done so

218 Kevin M. Brew, 'The Re-Emergence of Nuclear Weapons as "The Coin of the Realm" and the Return of Nuclear Brinkmanship in South Asia: The Nuclear Sword of Damocles still Hangs by a Thread', (2005) 52 *Naval Law Review* 177.

219 Bashir Ahmed Dabla, 'Sociological Dimensions and Implications of the Kashmir Problem' in NA Khan (ed), *The Parchment of Kashmir: History, Society and Polity* (Palgrave Macmillan 2012) 182.

220 Sumit Ganguly, *The Crisis in Kashmir: Portents of War, Hopes of Peace* (CUP 1997) 91.

221 Hangloo, (n 15) 52–53.

222 Dabla, (n 219) 181.

223 See generally Agana P Chatterji, Parvez Imroz, Gautam Navlakha, Zahir-Ud-Din, Mihir Desai and Khurram Parvez, *Buried Evidence: Unknown, Unmarked and Mass Graves in Indian-Administered Kashmir, a preliminary report* (International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir 2009) <<http://www.kashmirprocess.org/graves>> accessed 15 July 2016; Asia Watch and Physicians for Human Rights, 'Rape in Kashmir: A Crime of War' (*Human Rights Watch*) <<https://www.hrw.org/sites/default/files/reports/INDIA935.PDF>> accessed 15 July 2016; Amnesty International, *Denied: Failures in Accountability for Human Rights Violations by Security Personnel in Jammu and Kashmir* (Amnesty International Ltd 2015).

224 See generally Cabeiri Debergh Robinson, 'Too Much Nationality: Kashmiri Refugees, the South Asian Refugee Regime, and a Refugee State, 1947–1974' (2012) 25 *Journal of Refugee Studies* 344.

with impunity.²²⁵ The legal perspective on the presence of the unrepresentative government and the human rights violations in Kashmir will be discussed in detail in Chapter 5.

It is noteworthy that the culture of Kashmir has survived even after the un-called for and illegal partition of the region after the Indo-Pakistani war of 1947. The people of Kashmir have maintained and contributed to the development of the Kashmiri consciousness of *Kashmiriyat* within the Kashmiri communities in Pakistani Occupied Kashmir, including internally displaced Kashmiris and the Kashmiri diaspora.²²⁶ In Indian-Occupied Kashmir, the people in the Vale of Kashmir have maintained this bond with the Kashmiri Pandits, who were evacuated from Kashmir by the Indian government to Jammu in 1990.²²⁷ India characterised Kashmiri Pandits as migrants and their plight was exploited to convey the false message of communal violence in Kashmir.²²⁸ Propaganda from the Indian government was used to try to break the culture of *Kashmiriyat*. The Indian policy of destroying the culture of Kashmir and its legal consequences will be explored further in chapter five. However, suffice it to say that the Kashmiri people have managed to maintain their culture of *Kashmiriyat* across the *de facto* borders. Furthermore the Kashmiri diaspora, through discussion websites and forums all over the world, has been able to maintain their bond of *Kashmiriyat*.

Detractors of the concept have called it the un-Islamic and/or anti-Hindu work of pseudo-intellectuals. In terms of its political dimensions, it has come to be of use to politicians, separatists, and pro-Pakistani groups today, though

225 “5 July 2015 will mark 25 years since the AFSPA in effect came into force in Jammu and Kashmir. Till now, not a single member of the security forces deployed in the state has been tried for human rights violations in a civilian court. This lack of accountability has in turn facilitated other serious abuses”, Minar Pimple, Senior Director of Global Operations at Amnesty International. Amnesty International, ‘India: Accountability still missing for human rights violations in Jammu and Kashmir’ (Amnesty International 1 July 2015) <<https://www.amnesty.org/en/latest/news/2015/07/india-accountability-still-missing-for-human-rights-violations-in-jammu-and-kashmir/>> accessed 15 July 2016.

226 Patricia Ellis and Zafar Khan, ‘Kashmiri Displacement and the Impact on Kashmiriyat’ (2003) 12(4) Contemporary South Asia 523.

227 United News of India, ‘Pandits welcome, but no homeland: Geelani’ *Greater Kashmir* (Srinagar, 20 April 2006) <<http://www.greaterkashmir.com/news/news/pandits-welcome-but-no-homeland-geelani/5662.html>> accessed 15 July 2016.

228 Ellis and Khan, (n 226) 523, 530.

it has also been put to the opposite use by Indian politicians.²²⁹ Communal tensions and mass migration out of the valley have diluted the culture among the youth. The Indian government has also been accused of deliberately turning Kashmiris on each other through their counter-insurgency operations, tactics of humiliation, and corruption in government.²³⁰ However, these communalist interpretations and divisive tactics can be said to miss the key elements of *Kashmiriyat*, and its significance to the people.²³¹

The fact that Kashmiri people have remembered the Kashmir issue for 69 years, across borders and among the Kashmiri diaspora, is itself associated with their sense of *Kashmiriyat*, which they truly want to protect.²³² The wholesale acceptance of *Kashmiriyat* in Kashmir's public discourse is absolutely central²³³ and is the basis of the vitality of the Kashmiri identity.²³⁴ The notion of *Kashmiriyat* is not only an aspect that defines the people of the former Princely State of Kashmir, but it also, to some degree, allows the Kashmiris an additional basis for self-determination in the post-colonial period, where the historical debate on the claim for self-determination has transformed into a democratic one. This argument will be particularly useful in discussing the democratic representation of Kashmiris in the Union of India, and this aspect will be discussed in Chapter 5.

The Position of Regional Parties on the Kashmir Question

In order to find a solution to the Kashmir issue, it is imperative to identify the position of the parties directly related to the dispute in order to make any solution workable. As discussed in Chapter 1, India has constitutionally included Kashmir into its union. On the other hand, Pakistan and China subscribe

229 Hangloo, (n 15) 39, 41, 42, 49, 50.

230 *ibid* 52, 53.

231 *ibid* 62.

232 Nasreen Ali, Patricia Ellis and Zafar Khan, 'The 1990s: A Time to Separate British Punjabi & British Kashmiri Identity' in Gurharpal Singh and Ian Talbot (eds), *Punjabi Identity: Changes and Developments*, (Manohar 1996); Patricia Ellis and Zafar Khan, 'Diasporic Mobilisation and the Kashmir Issue in British Politics' (1998) 24 *Journal of Ethnic and Migration Studies* 471.

233 Zutshi, (n 23) 3.

234 G Rizvi and R Cassen, 'Kashmir Special Issue' (1995) 4(1) *Contemporary South Asia* 5.

to the view that the question of the territory of Kashmir under their control would be reopened at the time of the final solution of the Kashmir question.²³⁵

The parties, including the National Conference, Congress, and others, remained loyal to the Indian constitution and are considered by some to be collaborators to repressive rule. There is a parallel majority voice in Kashmir, one which started during the era of the political uprisings in Kashmir, especially after 1947. Only India denies the self-determination and plebiscite to Kashmiris. Therefore, the parties that cropped up in the Indian-Occupied Kashmir are significant for the purposes of this book. These parties do not claim any allegiance to the Indian constitution and therefore are not allowed to participate in the elections.²³⁶ The effect of this restriction will be discussed in Chapter 5. These parties include the Plebiscite Front, *Mehaz-e-Azadi*, Jammu Kashmir Liberation Front (JKLF), All Party Hurriyat Conference (APHC), and the Democratic Freedom Party (DFP). These parties are called secessionist parties as they seek a solution for Kashmir within the United Nations resolutions. The APHC, which is divided into two factions,²³⁷ works under the 1993 Hurriyat Conference Constitution, which rejects any solution to the Kashmir issue within the parameters of the Indian constitution and demands that a resolution on the Kashmir issue must take place either through the implementation of standing UN resolutions or tripartite talks.²³⁸ These local parties have a common demand for self-determination or *Azadi* (freedom).

The pro-independence parties are generally ready to negotiate with the governments of India and Pakistan to find a peaceful solution for Kashmir. However, the traditional APHC, led by Ali Shah Geelani, insists that the talks should take place under the UN auspices. The moderate APHC had several meetings with India and agreed to a progressive dialogue, which is often subjected to massive hiccups and halts due to the deterioration of the human rights situation in Kashmir. As far as the traditional APHC and DFP are concerned, they are of the opinion that as long as India considers Kashmir as an integral part, all

235 See, Chapter 1 of this book.

236 S Chapalgaonkar, *Law of Elections* (2nd edn, All India Reporter Pvt. Ltd 1999) 131.

237 In 2003 the APHC split into traditional and moderates. The traditional APHC, led by Syed Ali Shah Geelani, favour the position that the talks should include India, Pakistan and separatists, and that they must be held under the auspices of UN. The moderate APHC led by Mirwaiz Umer Farooq agree to India's preferred route of bilateral talks.

238 A M Dar and Arshad Me'raj, 'Shabir Shah, Aziz, Azam Inqallabi to Join Hurriyat (M)' *Greater Kashmir* (Srinagar, 8 January 2008) <<http://www.greaterkashmir.com/news/news/shabir-shah-aziz-azam-inqallabi-to-join-hurriyat-m/27506.html>> accessed 15 July 2016.

dialogue is bound to fail.²³⁹ The arrangement created by the Simla Agreement in 1972, which focuses on using bilateral negotiations to solve the disputes between India and Pakistan, has not created any negotiating space for the local parties in the dialogue. This is another reason why the bilateral dialogue has always been unsuccessful.

All these pro-independence political parties unanimously believe that it is the duty of India to implement the plebiscite resolution that they have agreed upon. They especially insist on the implementation of the UNCIP resolution of 5 January 1949, which declared that the question of the accession of the State of Jammu & Kashmir to India or Pakistan would be decided through the democratic method of a free and impartial plebiscite.²⁴⁰ The substance of this particular resolution is also present in Security Council resolution 47 of April 1948, which sets forth a two-part recommendation consisting of demilitarisation and plebiscite.²⁴¹

The local parties also commemorate self-determination day on 5 January every year, appealing to the UN Secretary General to pressure both India and Pakistan to immediately implement the Security Council resolutions and give the people of Kashmir a chance to exercise their right to self-determination.²⁴² Very recently, some of these parties have started to unite to pursue the resolution of the Kashmir issue with a single voice and this has already started to yield a positive response.²⁴³ These parties also believe in a solution within the democratic framework for the whole of Jammu and Kashmir. The leader of JKLF, Yasin Malik, started a six-month-long campaign called *Safr-e-Azadi*

239 BBC News on-line, 23 January 2004 & BBC News on-line, 23 January 2004.

240 UNCIP Res (5 January 1949) para 1.

241 UNSC Res 47 (1948) SCOR, 3rd Sess UN Doc. S/726.

242 AM Dar 'Hurriyat (G) for Deployment of UN peace Keeping Forces in J&K' *Greater Kashmir* (Srinagar, 5 January 2008) <<http://www.greaterkashmir.com/news/news/hurriyat-g-for-deployment-of-un-peace-keeping-forces-in-j-k/27382.html>> accessed 15 July 2016.

243 The *Mehaz-e-Azadi* and Democratic Freedom Party joined Hurriyat (M) after Chairman Mirwaiz Umar Farooq invited them to do so. See, A M Dar and Arshad Me'raj, 'Shabir Shah, Aziz, Azam Inqallabi to Join Hurriyat (M)' *Greater Kashmir* (Srinagar, 8 January 2008) <<http://www.greaterkashmir.com/news/news/shabir-shah-aziz-azam-inqallabi-to-join-hurriyat-m/27506.html>> accessed 15 July 2016; AM Dar, 'Mirwaiz Invites Shah to Hurriyat' *Greater Kashmir* (Srinagar, 10 January 2008) <<http://www.greaterkashmir.com/news/news/mirwaiz-invites-shah-to-hurriyat/27594.html>> accessed 15 July 2016 and AM Dar 'In the Martyr's Graveyard, Hurriyat (M) comes Alive' *Greater Kashmir* (Srinagar, 15 January 2008) <<http://www.greaterkashmir.com/news/news/in-martyrs-graveyard-hurriyat-m-comes-alive/27790.html>> accessed 15 July 2016.

(Journey of Freedom), throughout the former Princely State of Kashmir.²⁴⁴ The aim of the campaign was to strengthen the secular fabric of Kashmir. According to the Chief Information Commissioner of the government of India, Wajahat Habibullah, *Safri-e-Azadi* demands the rehabilitation of Kashmiri Pundits, extends the support for the Indo-Pakistani dialogue process, and demands the involvement of Kashmiris in the dialogue process.²⁴⁵

From the preceding discussion, it is clear that all the Kashmiri parties believe that Kashmiris should be allowed to participate politically in the decision-making process that concerns them. Just as the other self-determination aspirants in the world have their guerrilla organisations,²⁴⁶ Kashmir also has militant outfits that enter into combat on a regular basis with the Indian Army. The regular clashes between them have resulted in immense death and destruction. The concept of *Kashmiriyat* has been seen as a common link between pro-independence leaders from Sheikh Abdullah onwards,²⁴⁷ and has also been associated with the armed conflicts.²⁴⁸

The first militant outfit was JKLF which began in 1989²⁴⁹ and continues today, but now as a pro-independence political party. In 1994, the United Jihad Council²⁵⁰ (UJC) was formed as a coalition of combatant militant forces in order to coordinate their activities. It is headed by Syed Salahuddin, the leader of *Hizb-ul-Mujahideen*, the largest of the *Jihad* groups operating in the Indian part of Kashmir.²⁵¹ The UJC controlled most of the militant groups' active in the Kargil War between India and Pakistan in 1999.²⁵² Five militant groups are considered to be influential in the region: *Lashkar-e-Taiba*, *Hizbul Mujahideen*, *Harkat-ul-Mujahideen*, *Al-Badar*, and *Tehrik-i-Jihad*.²⁵³ However, within the

244 NA Thokar, 'JKLF to Launch Safri-e-Azadi in PaK, Northern Areas' *Greater Kashmir* (Srinagar, 27 June 2007).

245 Interview of W Habibullah with P Andley (2007) 2(4) *Kashmir Affairs*, 74.

246 Such as the Forest Brothers of Baltic States and KLA in Kosovo.

247 Schofield, (n 169) 172, 174, 183, 196, 199, 201.

248 Jonah Blank, 'Kashmir: Fundamentalism Takes Root' (1999) 78 *Foreign Affairs* 36, 41.

249 Kristoffel Lieten, 'Jammu and Kashmir: Half a Century of Conflict' in Monique Mekenkamp, Paul von Tongeren and Hans van de Veen (eds), *Searching for Peace in Central and South Asia* (Lynne Rienner Publishers 2002) 362, 366.

250 Also known as the *Muttahida Jihad Council* (MJC).

251 Wikipedia, 'United Jihad Council' <http://en.wikipedia.org/wiki/United_Jihad_Council> accessed 5 January 2008.

252 BBC News, 'World: South Asia Pakistan and the Kashmir militants' *BBC News* (London, 5 July 1999) <http://news.bbc.co.uk/2/hi/south_asia/386537.stm> accessed 5 January 2008.

253 Alastair Lawson, 'World: South Asia Pakistan and the Kashmir militants' *BBC News* (London, 5 July 1999) <http://news.bbc.co.uk/2/hi/south_asia/386537.stm> accessed 5 January 2017.

span of a few years, dozens of militant groups with similar-sounding names have emerged.²⁵⁴ Many of these militant organisations receive training from Pakistan, in particular received funding from the Pakistani Inter-Service Intelligence spy agency.²⁵⁵

India has long tried to associate all insurgency in Kashmir to Pakistan and have labelled them all as terrorism.²⁵⁶ However, Kashmiris have shown their desire to be independent from both India and Pakistan.²⁵⁷ This is clear from their concerted demand for a plebiscite and the implementation of the UN resolutions as a solution for the Kashmir issue. India's attempts to reject Kashmiris' right to self-determination by labelling it as terrorism²⁵⁸ is considered to be a distortion of facts as proven by the UN Security Council Resolutions on Kashmir. In an interview Abdul Wahid Kashmiri, Chief Commander of the militant organisation *Lashkar-e-Taiba*, termed the right to self-determination as the birth right of Kashmiris and requested:

...the international community to pressurise India to settle the Kashmir dispute as per the UN resolution...India has always tried to mislead the world and has never shown seriousness to settle the Kashmir issue... we are ready to help the people of Kashmir to achieve self-determination and force India to admit the demands of Kashmiri peoples to self-determination.²⁵⁹

During October 2007, the UJC signed a declaration against the use of anti-personnel mines and committed to abide by the fundamental rules of the

254 Hassan Abbas, 'Pakistan through the Lens of the "Triple A" Theory' (2006) 30 Fletcher Forum of World Affairs 181, 189–90. <http://belfercenter.hks.harvard.edu/publication/713/pakistan_through_the_lens_of_the_triple_a_theory.html> accessed 15 July 2016.

255 Swami, (n 9).

256 Schofield, (n 169) xiv; Staff, 'Kashmir attack: India 'launches strikes against militants' *BBC News* (London, 30 September 2016) <<http://www.bbc.com/news/world-asia-37504308>> accessed 5 December 2016.

257 Jha, (n 9).

258 Sushil Aaron, 'PM Modi's hardline Kashmir strategy suits BJP, but not India or the Valley' *Hindustan Times* (New Delhi, 7 September 2016) <<http://www.hindustantimes.com/analysis/pm-modi-s-hardline-kashmir-strategy-suits-bjp-but-not-india-or-the-valley/story-zkJdNLGMYEMafvulkvj86O.html>> accessed 10 December 2016.

259 'Self-Determination is birth Right of Kashmiris: LeT' (*News Agency of Kashmir*, 1 June 2008) <<http://twocircles.net/node/36272#.WFAKwrXyzIU>> accessed 13 December 2016.

four Geneva Conventions of 1949 and the 1977 additional protocol.²⁶⁰ This is considered to be a positive sign as India is herself not party to the second additional protocol to the Geneva Convention.

Youth nowadays are hesitant to join pro-independence parties like JKLF and APHC because of the threat of arrest and beatings, as well as the effect on their possible careers.²⁶¹ There have also been allegations about the facilitation of drug addictions.²⁶² In 2008, peaceful protests were taken up by Kashmiri youth as a response to the widespread human rights violations by the Indian government, from land grabbing to extrajudicial killings.²⁶³ The violence of the state has not abated, however. In the summer 2010, 120 Kashmiri youth were killed.²⁶⁴ In 2011, some progress was made when amnesty was granted to 1,200 youth for throwing rocks at authorities, and the Indian State Human Rights Commission acknowledged the presence of 2,000 mass graves along the LOC. However, since then, in the State visits and reactions to conflict, India has continued to treat Kashmir as the ground of its tensions with Pakistan.²⁶⁵ In 2016 the Kashmir unrest resurfaced, killing thousands and leaving hundreds blinded²⁶⁶ due to pellet gun injuries.²⁶⁷

Conclusion

In the above analysis, there was an overview of the factual situation in Kashmir that covered both key events in its history and the present situation. Kashmiri

260 Hassan Zainagiree, 'No Coercion from UJC' *Greater Kashmir* (Srinagar, 15 February 2008).

261 Hafsa Kanjwal, 'Kashmiri Youth: Redefining the Movement for Self-determination' Aljazeera Centre for Studies (15 March 2016) <http://studies.aljazeera.net/mritems/Documents/2016/3/15/e53e4b5b55c44065942c4d8afaefd980_100.pdf> accessed 21 December 2016.

262 Hangloo, (n 15) 53; Kanjwal, (n 261).

263 Kanjwal *ibid*.

264 *ibid*.

265 BBC News, 'Kashmir profile – Timeline' *BBC News* (London, 1 March 2016) <<http://www.bbc.com/news/world-south-asia-16069078>> accessed 15 July 2016.

266 Mirza Waheed, 'India's crackdown in Kashmir: is this the world's first mass blinding?' *The Guardian* (London, 8 November 2016) <<https://www.theguardian.com/world/2016/nov/08/india-crackdown-in-kashmir-is-this-worlds-first-mass-blinding>> accessed 30 November 2016.

267 Zacharie Rabehi and Kabir Agarwal, 'Blind in Kashmir with 100 pellets lodged in his head' (Aljazeera, 7 December 2016) <<http://www.aljazeera.com/indepth/inpictures/2016/11/blind-kashmir-100-pellets-lodged-head-161124075129498.html>> accessed 8 December 2016.

history is rather complicated since its status within international law was not clear at the end of the British Indian Empire. Nevertheless, under the Government of India Act 1935 and the Indian Independence Act 1947, the Princely States had an option to remain independent. Kashmir, the former Princely State, today has changed into a tripartite political arena which is under the control of India, Pakistan, and China. Röder argues that today, all parts of the territory of the former Princely State are, or have temporarily become, non-self-governing territories.²⁶⁸

This chapter demonstrated that Kashmiris' ethnicity and their distinctive culture of *Kashmiriyat* which is linked to its history, geography, and culture has given Kashmiris an identity as a people for whom division through religion has no meaning. In the words of Salman Rushdie:

The words Hindu and Muslim had no place in their story...in the *valley* [*Kashmir*] these words were merely descriptions, not divisions. The frontiers between the words, their hard edges, have grown smudged and blurred.²⁶⁹ (Emphasis added)

Over the years, Kashmiri culture has developed in such a way that it is neither exclusively Hindu nor purely Muslim.²⁷⁰ It is this secular culture of Kashmir that has bound its people together through their turbulent history over the centuries.

Despite the Dogras' repressive rule, Kashmir as a territory was consolidated with well-defined administrative borders, and a distinct population and government. However, it was the undemocratic authoritarian governance that produced civil disobedience against tyrannical Dogra rule. This nonetheless should not have affected Kashmir in becoming recognised as a country.²⁷¹ In 1931, mass civil disobedience against the tyrannical rule of the Dogras was launched in Kashmir. The fame of 'popular sovereignty' forced the Dogras to make changes in their administration and to establish a responsible democratic government during the early 1940s. These positive political changes were brought to a halt by the civil war and the partition of British India, which created confusion, resulting in the Maharaja's signing of the Instrument of Accession

²⁶⁸ Tilmann J Röder, 'Kashmir', *Max Planck Encyclopaedia of Public International Law* (2011), para 19.

²⁶⁹ Salman Rushdie, *Shalimar the Clown* (Random House 2005) 57.

²⁷⁰ Kaumudi, *Kashmir: Its Cultural Heritage* (Gulshan Books 2005) 253.

²⁷¹ Frederic Drew, *The Jammu and Kashmir Territories* (first published 1875, Capital Publishing House 1997) 1.

under duress. The Instrument of Accession was, however, conditional to the conduct of a plebiscite. The illegal occupation and division of Kashmir followed accession. It came to surface that at the eve of decolonisation, Kashmir was a political administrative unit, which became independent by the British Mission Memorandum in 1946, as it did not join any of the dominions by 15 August 1947. The British ignored their responsibility towards Kashmir, which was its protectorate under the Treaty of Amritsar 1846. The hasty British retreat from the Indian sub-continent hence resulted in the occupation and division of the territory of Kashmir.

The Kashmir issue is exactly the same after 70 years as it was when Mountbatten left India. The present *de facto* frontier between India and Pakistan is identical to the ceasefire line fixed in 1949. The Kashmir issue exemplifies the limitations of the UN in international conflict resolution, along with India's disrespect for the Kashmiris' right to self-determination, which has led to unprecedented devastation in the region. Now India and Pakistan are engaged in bilateral talks, which maintain the status quo while the human rights violations in the Indian part of Kashmir continue. Under international law the people of Kashmir have a right to a plebiscite, and for that reason alone bilateral decisions would neither resolve this dispute nor be valid under international law.²⁷²

The Princely State of Kashmir was constitutionally integrated by India into its Union, making the issue more difficult to resolve. Indian governance in Kashmir has proved far from tranquil. All the irregularities that India has committed have been made possible with the help of the pro-Indian government. The ministers and bureaucrats of this government have looted the public exchequer with impunity and crude, Mafia-style authoritarianism.²⁷³ Sheikh Abdullah, from 1947 till his death in 1982, spent a total of fourteen years in detention for political offences arising from his obdurate championship of independence for his native state,²⁷⁴ Kashmir. After 1989, a popular insurrection started in IOK and India responded with harsh militarism, crushing the claims of Kashmiris for self-determination to restore their historical title. The question immediately arises as to whether this government represents

272 See generally, Tilmann J Röder, 'Kashmir', *Max Planck Encyclopedia of Public International Law* (Jan 2011).

273 Sumantra Bose, *The Challenge in Kashmir – Democracy, Self-Determination and a Just Peace* (Sage Publications 1997) 32.

274 Hodson, (n 130) 568.

the Kashmiri people. The presence of an unrepresentative government and the human rights violations it commits generates the valid possibility of discussing the Kashmir question as a case where there has to be the restoration of historical title under international law, which could be achieved through self-determination.

The Restoration of Historical Title & Self-determination

Introductory Observations

A number of basic international law concepts underpin the restoration of historical title and the right to self-determination such as statehood, sovereignty, recognition,¹ illegal occupation, state continuity, the definition of ‘peoples’, human rights, etc. The purpose of this chapter is to introduce and clarify these legal notions, which will offer a basis for further analysis and elucidation on the relevant discussions with reference to the status of Kashmir before and after the occupation in 1947. Discussing these concepts here facilitates the discussion in later chapters, allowing for an accurate examination of whether the restoration of historical title can be claimed for the territory of Kashmir if it is raised as part of the political entitlement of the right to self-determination. It will also allow us to study how these additional principles assist in preserving the identity of a state that has ceased to function after its occupation. This study contends that Kashmir’s final legal status cannot be resolved through the Indian domestic political system because it is burdened by the heavy baggage of an inflammatory history,² human rights violations,³ long-term poverty,⁴ political strife, and severe crisis in the rule of law that has rendered most ‘rights’ under the law as mere parchment promises.⁵ Therefore, the only genuine arrangement possible is to allow Kashmiris to determine their future and decide whether they wish to restore their historical title to their territory through the exercise of their right to self-determination.

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- 1 Igor Grazin, ‘The International Recognition of National Rights: The Baltic States’ Case’ (1991) 66 *Notre Dame Law Review* 1385, 1385.
 - 2 Nilanjan Raghunath, ‘Jammu and Kashmir: Competing Concepts of Nationalism’ (2006–07) 2 *Yale Journal of International Affairs* 44, 49.
 - 3 For which there is no accessible remedy, despite paper promises: see, Amnesty International, “DENIED” Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir’ (Amnesty International 2015) 24.
 - 4 Michael Brecher, ‘Kashmir in Transition: Social Reform and the Political Future’ (1952–53) 8 *International Journal* 104, 104.
 - 5 Gary Haugen and Victor Boutros, ‘And Justice for All: Enforcing Human Rights for the World’s Poor’ (2010) *Foreign Affairs* 51, 56.

The discourse in this chapter follows a pragmatic approach and introduces a working typology to the self-reliant concepts of the restoration of historical title and the right to self-determination, alongside other concepts. At first glance, it may seem that these international principles are quite separate. However, the analysis in this chapter will demonstrate that these two principles are complementary and could assist in protecting the interests of peoples claiming the right to external self-determination in order to restore their independent status that was lost on account of illegal occupation. The interaction of these two different principles enhances the case for independence in situations where people have recognised claims over territory, such as in the Baltic States and Kashmir.

To this end, this chapter conceptualises the principle of restoring historical title and argues that it is applicable to territories that were illegally annexed. The illegality of the occupation forms the basis of the persuasive moral argument that the occupied territories have the right to restore their title to what it was prior to their illegal annexation, as in the case of the Baltic States (Estonia, Lithuania and Latvia). In order to restore the title of the Baltic States, plebiscites were conducted⁶ and these led to state continuity.

Restoration in such states is possible because the occupied 'people'⁷ share a distinctive relationship with their 'territory',⁸ which has been seized against their will and, as such, their 'nation' remains preserved in their memory.⁹ To this end, this chapter considers the conceptualisation that to resurrect the historical title of occupied territories, the political claim to the right to self-determination on the basis of 'national character'¹⁰ is significant.¹¹

6 HJ Uibopuu, 'Plebiscite', *Encyclopaedia of Public International Law* 111 (1997) 1053.

7 UNGA Res 217 A (III) (10 December 1948) UN Doc A/810; UNGA Res 1514 (XV) (14 December 1960); Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995).

8 *Western Sahara* (Advisory Opinion) (1975) ICJ Rep 12.

9 Peter Van Elsuwege, 'State Continuity and its Consequences: The Case of the Baltic States' (2003) 16 (2) *Leiden Journal of International Law* 377, 381.

10 Grazin, (n 1) 1419.

11 Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law* (Martinus Nijhoff 2003); Lauri Mälksoo, 'Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in the International Law' (2000) 69 *Nordic Journal of International Law* 289, 309; Grazin (n 1); Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993); Lawrence S Eastwood, 'Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia' (1993) 3 *Duke Journal of Comparative and International Law* 299, 316;

Contemporary international law rejects the use of illegal force to justify title to any territory, and that includes situations involving the annexation of abandoned European third world colonies (e.g. Western Sahara¹²) and other territories (e.g. Indian Native or Princely States, including the Princely State of Kashmir) by neighbouring states. However, within international law, the statehood of Princely States has not received much attention. In this chapter, the situation of Princely States will be discussed in some detail to clarify any antagonism about their sovereignty within international law.¹³ Conversely, within international law there is no rule that could prevent occupied people from determining the future political status of their territory through their own freely expressed will.¹⁴ The restoration of historical title for such territories remains an option particularly because the occupier cannot demonstrate a 'peaceful and continuous display of a State authority'.¹⁵

The normative content of the restoration of historical title relates to the principles involved in the right to external self-determination. The right to self-determination had its genesis in the rise of nationalism¹⁶ and the establishment of nation-states,¹⁷ where people share an interesting relationship with their 'nations'.¹⁸ In modern times, the *locus standi* of the political right to self-determination shifted to being a recognized legal right, and this has played

Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Librairie Droz 1968).

- 12 See generally, Jaques Roussellier, 'How Autonomous is Autonomy?: The Western Sahara Dispute in a Bind' (2008) 6 Viewpoints (Middle East Institute) 2.
- 13 See, for example, Paras Diwan, 'Kashmir and the Indian Union: The Legal Position' (1953) 2 International and Comparative Law Quarterly 333, 334; Shakti Kak, 'The Agrarian System of the Princely State of Jammu and Kashmir' in Waltraud Ernst and Biswamoy Pati (eds) *India's Princely States: People, Princes and Colonialism* (Routledge 2007) 68.
- 14 *Western Sahara* (n 8), 14.
- 15 *Island of Palmas (United States v. the Netherlands)* (1928) 2 UN Rep RIAA 829, 829.
- 16 Edward T Canuel, 'Nationalism, Self-Determination, and Nationalist Movements: Exploring the Palestinian and Quebec Drives for Independence' (1997) 20 Boston College International and Comparative Law Review 85.
- 17 Lung-Chu Chen, 'Self-Determination and World Public Order' (1991) 66 Notre Dame Law Review 1287, 1288.
- 18 Joshua Castellino and Jeremie Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 Macquarie Law Journal 155, 157; Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 International and Comparative Law Quarterly 241, 245; Paul H Brietzke, 'Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict' (1995–96) 14 Wisconsin International Law Journal 69, 96.

a huge role in the recognition and creation of states within international law.¹⁹ The review in this chapter therefore illustrates that ‘people’²⁰ in self-determination claims remain the central source of sovereignty and that the applicability of this right is not restricted to colonies in the classic sense, but is also available to people subjected to aggression, annexation, occupation, non-representative government, and/or widespread human rights violations.²¹ In these situations, ‘the right of self-determination’, though ignored by the dominant state, is derived legally not only *ipso facto* from international law, but also from the actual legal position of the dominant state that can be qualified as an aggressor’.²²

This chapter hence argues that even if the right to self-determination is ignored by the aggressor state, it is still valid, and it has a particular significance in situations that involve restoring historical title to a territory that was lost due to illegal occupation. Nonetheless, this chapter acknowledges the limitations of claims for self-determination, as most modern-day states do not allow ‘secession’ claims for groups within their own territories for the fear of undermining the sovereignty of those established states.²³

This chapter is structured as follows: Part 1 discusses key concepts, including the restoration of historical title; illegal annexation; occupation; state continuity/identity; recognition; statehood; and the significance of the right to self-determination to state continuity. It also discusses the statehood of

19 Henry J Steiner and Philip Alston, *International Human Rights in Context- Law, Politics, Morals* (2nd edn, OUP 2000) 1248.

20 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UNGAOR 25th Session Supp No. 28 UN Doc A/8028 (1970); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social, and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR); Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, UNGA Res 1514 (XV) (14 December 1960), UN GAOR 15th Session Supp No. 16 UN Doc A/4684 (1961), art. 2.

21 Declaration on Principles of International Law *ibid* 121; Vienna Declaration and Programme of Action UNGA A/CONF.157/23 (12 July 1993) UNGA Res 48/121 (20 December 1993).

22 Grazin, (n 1) 1396.

23 Malvina Halberstam, ‘Nationalism and the Right to Self-Determination: The Arab-Israeli Conflict’ (1995) 26 New York University Journal of International Law and Politics 573, 575; Ved Nanda and others ‘Self-Determination: The Case of Palestine’ (1988) 82 Proceedings of the Eighty-Second Annual Meeting of the American Society of International Law 334, 350.

Indian Princely states, both in terms of seeing them as protectorates as well as suzerain states. Part 2 addresses the debate regarding the right to self-determination, its genesis, and its applicability, both during decolonisation and in the post-colonial era. It also outlines the relevant debates on secession and addresses the shifting paradigms of the right to self-determination. Part 3 provides further analysis, including a discussion on the complementarity of the principles of restoration of historical title and self-determination for acquiring independence.

Part 1: The Restoration of Historical Title

The Restoration of Historical Title within International Law: A Critical Analysis of Illegal Occupation, State Continuity, Recognition, Statehood and the Right to Self-determination

By restoring historical title a conquered territory can be returned to its original sovereign, along with the restoration of the status of all persons and things that have been temporarily under occupation.²⁴ The restoration of historical title principle allows the inhabitants of a territory to reinstate their historical statehood. In other words, the restoration of historical title leads to independence, which is one way of achieving external self-determination. In some cases, like in the Baltic States, claims for the restoration of historical title and state continuity have led to the exercise of the right to self-determination.²⁵ However, in such cases, it is the claims for self-determination and independence that bring the whole question of restoration into the picture. In other words, the restoration of historical title at a practical level cannot be completed without people being able to exercise their right to self-determination. It must also be recalled that restoring historical title and self-determination are distinct principles within international law. People can use one or the other principle to claim freedom. However, for the restoration of historical title, the concluding act of giving people the right to exercise external self-determination is vital and, in that context, it is fair to say that the former principle is reliant on the latter in terms of confirming the claim. Nonetheless, it is also true that states cannot restore their lost historical title if it has not been robbed through occupation,

24 Henry Wheaton, *Elements of International Law: with a Sketch of the History of the Science* (B. Fellowers 1836) 288.

25 William Partlett, 'Restoration Constitution-Making' (2015) 9 *Vienna Journal on International Constitutional Law*, 514.

so the concepts remain distinct. Therefore, it is possible to call for restoration of historical title without directly addressing the issue of self-determination. However, for historical title to be fully restored, the exercise of the right to self-determination is indispensable.

The claim for self-determination often works as a breath of life to a people, giving them the hope of resurrecting their state. The Baltic States' preservation of state continuity,²⁶ for example, only gained full recognition under international law after these states restored their self-determination successfully through independence in 1991. Typically, most direct territorial claims have historical origins. The remedy in such situations, as Brilmayer argues, is granting the entitlement to territory that follows from a historical violation of territorial sovereignty.²⁷ In the Baltic States, historical title was restored after independence was successfully achieved through the exercise of self-determination. As such there is no rule within international law that can prevent people from choosing which rights they claim. Therefore, people can if they wish (and if they have concrete evidence) use either or both principles – state continuity and the right to self-determination – to ground their attempts to regain their historical title to their territory. Claims for restoration of historical title and state continuity can only be fulfilled after acquiring independence. This interconnection is important for situations like Kashmir where the concerned states, for their own self-interest, evade attempts by people to exercise their right to self-determination through the conduct of a plebiscite, thereby preventing use of the restoration of historical title. In the context of international public law, statehood is considered to be of utmost importance and is incapable of being nullified by illegal occupation.²⁸ On the contrary, the presence of occupation triggers safeguards for the statehood of the occupied state. This follows from the principle of *ex injuria non oritur jus* which states that no legal benefit can be derived from an illegal act.

In 1987, a public hearing on Baltic Dissidents was held by the US House of Representatives. In his opening remarks, Chairman Hoyer stated that, 'Indeed, it is the United States position, and the position which this Commission

26 Van Elsuwege, (n 9) 377.

27 Lea Brilmayer, 'The Institutional and Instrumental Value of Nationalism' in David Wippman (ed), *International Law and Ethnic Conflict* (Cornell University Press 1998) 58, 69.

28 Van Elsuwege, (n 9) 378; Grazin, (n 1).

shares, that these three Baltic nations are independent, occupied nations'.²⁹ Co-Chairman Dennis DeConcini further crystalised the US position that their defence of the Baltic States was based on human rights and historical title when he stated,

For decades the peoples of these countries have been imprisoned for attempting to exercise the most basic of human freedoms, the right to preserve their national culture, practice their religion, the right to emigrate, the right to freedom of speech and freedom of the press.³⁰

Indeed, in 1991, most Western countries supported the restoration of historical title of the Baltic States and refused to recognize the Soviet Union's *de jure* control subsequent to the annexation of these states in June 1940.³¹ In August 1991, for example, Estonia re-established its independence on the basis of the historical continuity of its statehood and received broad international recognition. It was accepted that the Republic of Estonia had not ceased to exist *de jure* since 1918 and throughout the period of Soviet occupation.³² Similarly, states supported Kuwait statehood in the face of Iraqi annexation. In fact 'most states supported violent action to defend the Kuwait's statehood [which] reaffirmed the continuing vitality of statehood as the ultimate value of the international legal system'.³³ As such, in determining claims for the purpose of the restoration of historical title, statehood and the freely expressed will of people to determine their future political status are of paramount importance.

29 14 Series 3 Basket III Hearings before the U.S. on Security and Cooperation in Europe and Other Congressional Hearings Reports and Prints I 1987, 'Implementation of the Helsinki Accords: Baltic Dissidents' October 6 1987 session (US Government Printing Office, Washington 1988) 2.

30 *ibid* 3.

31 17 Series 3 Basket III Hearings before the U.S. on Security and Cooperation in Europe and Other Congressional Hearings Reports and Prints I 1990–1991 'Implementation of the Helsinki Accords: Soviet Crackdown in the Baltic States' January 22 1991 session (US Government Printing Office, Washington 1991); President Bush Sr, 'US Support for Baltic Independence: Text to the President's Letter to Congress,' June 25, 1991, 2 pt2 Department of State Dispatch 471.

32 Jaan Salulaid, 'Estonia – Restoration of the Effect of Estonian International Treaties' (2001) 1 Baltic Yearbook of International Law 225, 225.

33 Martti Koskenniemi, 'The Future of Statehood' (1991) 32 Harvard International Law Journal 397, 397.

The discussions on the annexation of territories such as the Baltic States, Kuwait, and Kashmir, require the application of the law in force at the time.³⁴ Under the inter-temporal principle, as Jennings explains, territorial status is to be decided on the basis of the law in force at the time of the acquisition. It is the law in force at the time of the putative establishment of title that governs the subsequent assessment of the validity of that title.³⁵ This principle is important when dealing with matters of historical title since the recognition of statehood must apply contemporaneous law to any change in title, rather than applying laws that were enacted later. The inter-temporal principle was applied in the *Island of Palmas* case. Max Huber, as sole arbitrator, noted that 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled'.³⁶ This view was also supported by the ICJ Advisory Opinion of in the *Western Sahara* Case.³⁷ It was noted in the ICJ's response to the question, 'Was Western Sahara at the time of colonisation by Spain a territory belonging to no-one (*terra nullius*)?' and noted that: 'The request specifically locates the question in the context of "the time of colonization by Spain" and it therefore seems clear that the words "was Western Sahara ... a territory belonging to no-one (*terra nullius*)?" have to be interpreted by reference to the law in force at that period'.³⁸ Hence, territorial questions relating to former colonies occupied by neighbouring states have to be settled by the law valid at that time of occupation, as against the law later incorporated by the occupier. This aspect of the Kashmir case will be discussed in Chapters 4 and 5.

Under contemporary international law, the claim to historical title can co-exist with the exercise of the right to self-determination by the people, but it cannot be easily used against them. The ICJ in the 1975 landmark case of *Western Sahara* elaborated on the relationship between the right to self-determination and historical title, and reaffirmed the right to self-determination for the people of Western Sahara struggling against Moroccan military occupation. In this case the ICJ rejected Morocco's claim of historical 'legal ties' between the Sultan of Morocco and certain tribes living in Western Sahara at the time of

34 Thomas D Grant, 'A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law' (1999) 40 *Virginia Journal of International Law* 115, 166–67.

35 RY Jennings, *Acquisition of Territory in International Law* (Manchester University Press 1963) 53.

36 *Island of Palmas*, (n 15) 845.

37 [1975] ICJ Rep 12 ICJ, 12 (16 October).

38 *ibid* 30–31.

Spanish colonization.³⁹ As such, Morocco's claim could not affect the application of Resolution 1514 (XV) in the decolonization of Western Sahara, particularly in relation to the self-determination of its people. Of critical note was Judge Dillard's separate opinion, where he stated that 'it is for the people to determine the destiny of the territory not the territory the destiny of the people'.⁴⁰ Similarly, in the cases of West Irian, East Timor, and Belize, the UN General Assembly upheld the right to self-determination of the inhabitants of the territories over claims of historical title, and indicated that the wishes of the people take precedence in the disposition of their territories.⁴¹ These examples indicate that the right to self-determination does not require—but also does not prevent—the restoration of historical title. However, the practical application of the restoration of historical title requires the exercise of right to self-determination.

The 'historical ties' argument gains precedence when a territory has been illegally occupied and the occupier, as a part of its policy, attempts to incorporate the territory by illegal means or enacts various other changes, such as the alteration of territorial demographics by settling the non-residents there.⁴² This is because international law does not recognise title acquired by illegal occupation and, as such, the occupier's attempts to undermine the self-determination issue are not entertained. For instance, the Jewish settlers in Gaza Strip cannot determine the title of that territory through exercise of right to self-determination.⁴³

Contemporary perspectives on the historical title claim are offered by the 2016 Permanent Court of Arbitration (PCA) decision relating to the South China Sea dispute. The tribunal in this arbitration considered the distinction between historical title as belonging to states, and private rights belonging to individuals and communities in a particular area.⁴⁴ Where private rights are concerned, international law has long recognised that developments with

39 *Western Sahara*, (n 8) 14.

40 *ibid* 122; Thomas M Franck, 'The Stealing of the Sahara' (1976) 70 *American Journal of International Law* 694, 697–98.

41 SKN Blay, 'Self-Determination Verses Territorial Integrity in Decolonization' (1986) 18 *New York Journal of International Law and Politics* 441, 450.

42 Chris McGreal, 'Gaza Settlers Defy Sharon Evacuation Deadline' *The Guardian* (London 15 August 2005), 1; Staff, 'Israeli Settler Evicted Complete' *BBC News* (London, 23 August 2005) <http://news.bbc.co.uk/2/hi/middle_east/4177364.stm> accessed 18 June 2017.

43 Canuel, (n 16) 99.

44 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, (PCA) 2013-9, 12 July 2016, 312, para 798.

respect to international boundaries and conceptions of sovereignty should, as much as possible, refrain from modifying individual rights.⁴⁵ The overall dispute was based on Annex VII of the United Nations Convention on Law of the Sea, and instigated by the Philippines. There has also been heightened political interest from the United States in the outcome.⁴⁶ The arbitration was lodged over the maritime jurisdiction of the Philippines in the West Philippine Sea, contending that the '*nine-dotted line*' claim by China in the South China Sea was invalid. China declined to participate in this arbitration and the Ministry of Foreign Affairs of the People's Republic of China issued a Position Paper⁴⁷ arguing that this dispute concerns sovereignty and is '*beyond the scope of the UNCLOS*.'⁴⁸ In framing the dispute as an issue of sovereignty, China strongly asserted 'the history and fact of China's sovereignty over the South China Sea Islands and the adjacent waters'⁴⁹ by claiming that 'China was the first country to discover, name, explore and exploit the resources'⁵⁰ and had published a map in 1948, which showed the islands to be an integral part of China. Over the decades, China has also continually issued declarations, acts, and laws that refer to their historical rights over the South China Sea Islands. The tribunal decided in favour of the Philippines, but they stressed that they were not making a decision on sovereignty.⁵¹ The tribunal reviewed the meaning of 'historical title' in the context of applicable international law, and affirmed the 1960s UN formulation used for judging whether there was title to 'historic waters', which requires looking at whether there was a continuous exercise of authority over the area and whether it was recognized by other states.⁵² In terms of clarifying the terminology, the tribunal summarised:

45 *ibid* para 799.

46 James W Houck and Nicole M Anderson, 'The United States, China, and Freedom of Navigation in the South China Sea' (2014) 13 Washington University Global Studies Law Review 441, 447.

47 Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, (*Ministry of Foreign Affairs of the People's Republic of China*, 7 December 2014) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 10 January 2017.

48 *ibid*.

49 *ibid*.

50 *ibid*.

51 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)*, (PCA) 2013-9, 12 July 2016, 113, para 267.

52 *ibid* 94–95, para 221; 113, para 265.

The term 'historic rights' is general in nature and can describe any rights that a State may possess that would not normally arise under the general rules of international law, absent particular historical circumstances. Historic rights may include sovereignty, but may equally include more limited rights, such as fishing rights or rights of access, that fall well short of a claim of sovereignty. 'Historic title', in contrast, is used specifically to refer to historic sovereignty to land or maritime areas.⁵³

This decision as such suggests that although historical claims can be superseded by convention rights and rules,⁵⁴ they cannot be ignored entirely or illegally displaced. Clearly if historical claims are not in contravention of international law, there is some definite scope for them being affirmed by international tribunals.⁵⁵

Illegitimate Annexation and State Continuity: Occupation within International Law

With the advent of the European zest for exploration and conquest including the adventures of Christopher Columbus,⁵⁶ Europeans came into contact with indigenous peoples in faraway places.⁵⁷ At that time, 'occupation' was usually characterised as legal under the papal bulls⁵⁸ or as being the acquisition of *terra nullius*: territory belonging to no state.⁵⁹ Many modern territorial disputes

53 *ibid* 96, para 225.

54 *ibid* 103, para 247; 117, para 278.

55 Any action by state or people that is not in contravention to international law are allowed. This can be seen in the decision about the legality of Kosovo's unilateral declaration of independence, which was put by the United Nations to the ICJ at the request of Serbia. The ICJ's advisory response was that the adoption of the declaration of independence did not violate international law. Christopher J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia' (2009–10) 10 *Chicago Journal of International Law* 1, 14; Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo, (Advisory Opinion), [2010] ICJ Rep 403, 452.

56 Shelley Wright, *International Human Rights, Decolonisation and Globalisation-Becoming Human* (Routledge 2001) 52.

57 S James Anaya, *Indigenous Peoples in International Law* (2nd edn, Oxford University Press 2004) 16.

58 Such as the *Inter Caetera* 1493 from Pope Alexander VI.

59 James Simsarian, 'The Acquisition of Legal Title to Terra Nullius' (1938) 53 *Political Science Quarterly* 111.

have their roots in such historical occupations.⁶⁰ Before WWI, recourse to military force was mostly legal under international law and was a valid option for resolving territorial controversies. Therefore forceful conquest was often not considered to be in violation of the rules of international law.⁶¹ After WWI, rules on the use of force in international relations became stricter.⁶² On 27 August 1928 the Kellogg-Briand Pact was adopted in Paris, which banned the use of war as an instrument of national politics.⁶³ In the past, conquest, although condemned as ‘unjust war’,⁶⁴ could set in motion a process that over time gave rise to valid territorial title. However, modern international law does not recognise this process anymore.⁶⁵

The modern laws on occupation include the relevant parts of The Hague Regulations 1907,⁶⁶ the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949 (“the Fourth Geneva Convention”),⁶⁷ and by customary international law.⁶⁸ According to the Hague Regulations 1907, an occupation exists when, following a war between states,⁶⁹ a territory ‘is actually placed under the authority of the hostile army’.⁷⁰ As Article 43 of the Hague Regulations states, occupation does not confer sovereignty on the

60 Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (Routledge 1997) 148.

61 China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2004) 319.

62 Grant, (n 34) 164.

63 *General Treaties for Renunciation of War as Instrument of National Policy* (1929) 94 LNTS 57.

64 For more on wars see, Michael Walzer, *Just and Unjust Wars – A Moral Argument with Historical Illustrations* (3rd edn, Basic Books 2000).

65 Grant, (n 34) 166.

66 Particularly, Hague Convention No. IV Respecting the Laws and Customs of War on Land, 18 October, 1907, 36 Stat. 2277; Article 1 of International Declaration Concerning the Laws and Customs of War, 24 August 1874; Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publisher 1988) 22.

67 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* (Signed on 12 August, 1949) 6 UST 3516, 75 UNTS 287.

68 See Benvenisti, (n 11) 7–31, 98–106, 209–16; Timothy P. Bulnan, ‘A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Operations Other than War’ (1999) 159 *Military Law Review* 152, 182 n 2.

69 International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (18 October 1907), Art. 42 linked occupation with war.

70 *ibid* Art. 42.

occupant. This is now recognised as expressing customary international law.⁷¹ Further, occupation is a temporary situation and the same is reflected in the Fourth Geneva Convention.⁷² With the exception of Israeli occupations after the 1967 war, the law of occupation has rarely been consulted and invoked in the post-WWII period.⁷³ However, subsequent to the invasions of Iraq in 2003 by the US and UK, the law of occupation immediately began to apply to their actions.⁷⁴

Under the provisions of the Fourth Geneva Convention, occupation is not dependent on the formation of occupation administration. It is applicable to all cases of 'partial or total occupation' of the territory of a High Contracting Party, even if said occupation is met with no armed resistance,⁷⁵ which may happen when a threatened government cedes control over its territory to a foreign power⁷⁶ through an armistice⁷⁷ or peace⁷⁸ agreement. The Fourth Geneva Convention addressed the 'inalienability of sovereignty through the use of force'⁷⁹ and delimited control by an occupant over occupied territory. The Western Allies up to that point had used the idea of such inalienability' of sovereignty as the perfect justification for reoccupying their Southeast Asian colonies,⁸⁰ which were granted unilateral independence by Japan during their

71 International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg 14 November 1945–1 October 1946*, (Nuremberg 1947), 253–54.

72 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* (Signed on 12 August, 1949) 6 UST. 3516, 75 UNTS. 287.

73 Benvenisti, (n 11) 149.

74 The US position is that the occupation of Afghanistan ended in 2001 itself. See Mark Martins, 'Rule of Law in Afghanistan and Iraq' (2011) Army Law 21, 22. In general, however, the law of occupation is the acknowledged basic standard by both the US and UK, including in Iraq. See David J Scheffer, 'Beyond Occupation Law' (2003) 97 American Journal of International Law 842, 842.

75 Article 2 of International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* (Signed on 12 August, 1949) 6 UST. 3516, 75 UNTS. 287.

76 The German Occupation of Bohemia and Moravia in March 1939.

77 For example, the 'Armistice Agreement' of 11 November 1918 that established allied control over the Rhineland in Germany.

78 The Israeli occupation of the Gaza Strip did not change its status despite the 1979 Peace Treaty with Egypt. Egypt controlled Gaza before the war of 1967.

79 Benvenisti, (n 11) 97.

80 For the detailed discussion of the British decision to apply the law of occupation as a legal basis for their authority in Burma see, FSV Donnison and JRM Butler, *British Military Administration in the Far East 1943–46* (H.M.S.O., London 1956) 38–40.

occupation. It is therefore clear that as long as war was regarded as a lawful course of action in international affairs a treaty of peace was considered perfectly valid, even when imposed on the defeated party by the victor as an outcome of the use of force.⁸¹ However, as soon as the use of force was condemned under the international law a treaty of peace dictated by an aggressor became vitiated by duress.⁸²

In the contemporary era, territory is occupied if it is placed under the 'effective control' of a state. Within international law, the term 'occupation' is still a 'relative' term and it varies according to the nature of a territory. For example, it is easier to establish 'effective control' over uninhabited land than over inhabited territory. The effective control for inhabited territory is subject to the 'will of the people' through exercise of right to self-determination.

The determination of effective control in situations involving uninhabited territory is determined by the superior claim to sovereignty. For example, in case of *Eastern Greenland*,⁸³ the PCIJ held that Denmark had effective control and, as such, sovereignty over all of Greenland. They dismissed Norway's rebuttal that a certain area known as *Eirik Raudes Land* had been *terra nullius* when Norway issued a declaration of occupation.⁸⁴ Norway was estopped from going back on the statement by their Minister of Foreign Affairs agreeing to Denmark's plans for the area.

The law of occupation aims to preserve the sovereignty of the occupied state.⁸⁵ Many annexations, such as those of Western Sahara, East Timor, Palestine, and Kashmir, occurred during the period of decolonization after such colonial territories were abandoned by western powers and no proper arrangement was made for their inhabitants to express their will through the exercise of self-determination.⁸⁶ On the preservation of sovereignty, the law on occupation does not make any distinction between territories that were previously sovereign states (such as Baltic States) and abandoned colonies (such as Western Sahara/East Timor) that were not recognised as sovereign prior to their annexation. Furthermore, Palestine for example, was not treated as sovereign

81 Arnold McNair, *The Law of Treaties* (Oxford Clarendon Press 1961) 207, 209.

82 Hersch Lauterpacht, *International Law*, 1 (E. Lauterpacht ed, CUP 1979) 354; Yoram Dinstein, *War, Aggression and Self-Defence* (CUP 2001) 37.

83 *Legal Status of Eastern Greenland (Denmark. v. Norway.)* PCIJ (series A/B) No. 53 (5 April 1933) 46.

84 *ibid.*

85 Scheffer, (n 74) 843.

86 Marc Weller, 'Settling Self-determination Conflicts: Recent Developments' (2009) 20 *European Journal of International Law* 111, 113; David J Thompson, 'Climbing the Wall: Palestine and Self-Determination' (2003) 12 *Griffith Law Review* 288, 292.

in 1947 when Egypt, Syria, and Jordan annexed Gaza, the Golan Heights, and the West Bank, respectively. Further, in the 1947 war Israel included three per cent more territory to its state than was allocated to it by the UN.⁸⁷ Palestine's borders were again redrawn in the Six-Day war (6–10 June) in 1967. In the 1967 war, Israel occupied the West Bank, the Golan Heights, Gaza, East Jerusalem, and Sinai. However, Israel returned Sinai to Egypt on the basis of the Camp David Agreement of 17 September 1978.⁸⁸ Today Palestine is considered to be an occupied territory, mainly because sovereignty cannot be achieved by illegal annexation. Thus, practices that loom large during occupation like territorial incorporation, installation of new governments, and changes to territorial borders, do not affect the applicability of Fourth Geneva Convention. However, on many occasions the occupier is reluctant to accept the full *de jure* application of occupation law to situations in which they are involved because they believe the situation differs significantly from the typical case of occupation.⁸⁹ This departure from the application of occupation law, and the refusal of occupiers to acknowledge humanitarian law is preventing the application of norms such as due process, *jus cogens* and *erga omnes* human rights, self-determination, and economic development. As such it prevents the creation of a legal regime that is suitable for the territory in question.⁹⁰ This in turn is making the periods of occupation longer, such as in the cases of Palestine and Kashmir.

In such situations, the reliance of occupied people on the right to self-determination is significant as it asserts that the source of sovereignty rests in the people. This shift towards the understanding that sovereignty resides in the people and not the government was made possible due to developments in political thought and the emergence of the right to self-determination and self-rule.⁹¹ In that context, the law of occupation is significantly linked to the relevant international law, such as the restoration of historical title. In cases of justifiable occupation, the goal is to promote the welfare of the occupied people and to work towards the restoration of conditions of security and stability, and the creation of conditions in which the people can freely determine their own political future through the exercise of their right to self-determination.⁹²

87 Cassese, (n 7) 234.

88 William M Brinton, 'Israel: What is Occupied Territory? A Reply to the Legal Adviser' (1979) 2 *Harvard Journal of Law and Public Policy* 207.

89 Scheffer, (n 74) 843.

90 *ibid.*

91 Benvenisti, (n 11) 6, 29.

92 Canuel, (n 16) 115.

Furthermore, under the rules governing state continuity, the state that is annexed through military occupation (*occupatio bellica*) does not become extinct but is preserved. Hence, historically and politically, it is perfectly possible to speak of states that became *de facto* extinct in the past but continue to exist. The law is clear that a state may not acquire legal title to territory through the use of force.⁹³ Military occupations come to an end, either through the legal incorporation of the occupied territory – which is largely unworkable under international law – or with the restoration of the legitimate sovereign powers of the occupied state.⁹⁴

The legal justification for this rule primarily comes from the Atlantic Charter 1941, Article 2(4) of the UN Charter, Resolution 1514(XV), 2131(XX),⁹⁵ 2160(XXI),⁹⁶ 3314(XXIX)⁹⁷ and the Vienna Convention on the Law of Treaties 1969.⁹⁸ The significance of these international laws to the annexation of Kashmir will be discussed in Chapter 4.

In the Atlantic Charter of 14 August 1941, President Roosevelt and Prime Minister Churchill declared that they wished to see 'sovereign rights and self-determination restored to those who have been forcibly deprived of them'.⁹⁹ This principle was also reflected in the UN Charter and was based on the idea of collective security, in view of the League of Nations' inability to prevent war.¹⁰⁰ The nations of the world gathered at the General Assembly with the expectation that by sacrificing some of their sovereign rights for their security, international peace could be maintained.¹⁰¹ The UN system is a carefully crafted instrument that makes war illegal and unnecessary except in very limited

93 Article 17 of the Organisation of American States (OAS), Charter of the Organization of American States (30 April 1948) and UNSC Res 242 (1967) SCOR 22nd Session, 1382 mtg, UN Doc S/8247.

94 Arnold Duncan McNair, *Legal Effects of War* (2nd edn, CUP 1944) 318–20.

95 UNGAOR 20th Sess Supp No 14 UN Doc A/6014 11 (21 December 1965).

96 Strict Observance of the Prohibition of the Threat or Use of Force in International Relations, and of the Right Peoples to Self-Determination, UNGA Res 2160 (XXI) (30 November 1966).

97 Definition of Aggression, UNGA Res. 3314 (XXIX) (14 December 1974).

98 Preamble of Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into Force 27 January 1980) 1155 UNTS 331.

99 Daniel Thürer, 'Self-Determination', in *Encyclopaedia of Public International Law* (2000) vol IV, 365.

100 Lewis, 'The Big Voice: A Debate about the Powers at the U.N' *New York Times* (New York, 12 August 1990) 3.

101 Stephen M De Luca, 'The Gulf Crisis and Collective Security under the United Nations Charter' (1991) 3 *Pace Yearbook of International Law* 267, 269.

situations and through very limited means. To this end, under Article 2(4) of the UN Charter members are required to refrain from the threat or use of force against the territorial integrity or political independence of any state.¹⁰² Further, Article 2(7) extends this guarantee to the international community (except for enforcement measures under Chapter 7) against interference within the jurisdiction of a sovereign state.¹⁰³ The use of force is envisaged within the Charter as being legal in response to threats/breaches to the peace, or in response to aggression. Security Council authorisation is necessary for most military actions (Articles 39–42, 46), but Article 51 recognises acts taken in self-defense by Member States, though they need to be immediately referred to the Security Council and the collective system of global policing should be used to secure peace for all.¹⁰⁴

The historical relationship of a State with a claimed territory has been used to argue in the past that the claimed territory was an integral part of the state and should be returned to it.¹⁰⁵ Paragraph six of Resolution 1514(XV) could be used as the basis for this claim. Any disruption to the title of a sovereign state by annexation, occupation, or war is also contrary to the goals of the Charter. It is worth mentioning that during negotiations over Resolution 1514(XV), many states supported paragraph six of this Resolution because they visualised the right to self-determination as a right to be granted to colonies and not as a right to extend to the decolonised states. The latter interpretation made the Resolution seem like a threat to the territorial integrity of independent states. However, some countries accepted the opposite interpretation: that the historical claim pre-empts the right to self-determination.¹⁰⁶ In the historical title cases where the indigenous population has title over a territory, the question of ‘partial or total destruction of the national unity and territorial integrity’ of

102 Bruno Simma (ed), *The Charter of the United Nations- A Commentary* (OUP 1994) xx; NZ Basic, ‘International Law and Security Dilemmas in Multiethnic States’ (2002) 8 Annual Survey of International and Comparative Law 1, 5.

103 Basic, (n 102) 1, 6.

104 Thomas M Franck and Faiza Patel, ‘UN Police Action in Lieu of War: “The Old Order Changeth”’ (1991) 85 American Journal of International Law 63, 63.

105 Thomas D Musgrave, *Self-Determination and National Minorities* (OUP 2000) 237; Simon J Lincoln, ‘The Legal Status of Gibraltar: Whose Rock is it anyway?’ (1994) 18 Fordham International Law Journal 285.

106 Jordan believed that the usurpation of a part of the Arab territory of Palestine by the joint Aggression of Colonialism and Zionism constitutes an example where historical claim takes precedence over the right to self-determination. Thomas M Franck and Paul Hoffman, ‘The Right of Self-Determination in Very Small Places’ (1975) 8 New York University Journal of International Law and Politics 331, 370.

an outside state does not arise because they do not have historical title over the territory in question. Consequently, no rule of international law is violated.

The Resurrection of States and State Continuity/Identity: A Legal Analysis

The process of reinstating states predates the Peace of Westphalia,¹⁰⁷ which marked the beginning of the modern era in international relations.¹⁰⁸ The resurrection of Portugal dates back to 1640 and is reported by Emer de Vattel in his writings.¹⁰⁹ In 1580 when the ruling empire of Portugal was destroyed, the country was incorporated into the Kingdom of Spain. However, in 1640, Portugal re-established its independence and was resurrected as a state. Likewise, the Vienna Congress of 1815 re-established the independence of certain German and Italian states that were taken by Napoleon. The Netherlands was re-established after its incorporation by the French empire in 1810.¹¹⁰ In the 20th century's interwar periods, Poland lost and regained its statehood twice.

The Kingdom of Poland cemented a long association with the Grand Duchy of Lithuania by uniting to form the Polish-Lithuanian Commonwealth in 1386, and it became a federal union in 1569.¹¹¹ After the collapse of the Commonwealth in 1795, Poland did not regain its independence until 1918. Poland again lost its independence during WWII, when it was occupied by Nazi Germany and the Soviet Union. In 1989, communist rule was overthrown and Poland became what is sometimes known as the 'Third Polish Republic', but it had resumed statehood well before 1989. After the reinstatement of Poland as a subject of international law, it was seen as being identical to the previous extinguished state.¹¹² Likewise, states like Ethiopia, Czechoslovakia, Austria, and Albania that were annexed during WWII managed to re-establish themselves

107 The Peace of Westphalia refers to the Treaty of Münster and the Treaty of Osnabrück, signed on 24 October and 15 May 1648 respectively, which ended both the Thirty Years' War and the Eighty Years' War.

108 Daniel Philpott, 'Religious Freedom and the Undoing of the Westphalian State' (2004) 25 Michigan Journal of International Law 981, 983.

109 Emer de Vattel, *Le Droit des Gens* (1785) Book III, Chapter XIV, para 213.

110 Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law* (n 11), 5–6.

111 Władysław Roczniak, 'The Polish-Lithuanian Commonwealth' (*Oxford Bibliographies*, 3 June 2015) <<http://www.oxfordbibliographies.com/view/document/obo-9780195399301/obo-9780195399301-0119.xml>> accessed 10 January 2017.

112 Josef L Kunz, 'Identity of States under International Law' (1955) 49 American Journal of International Law 68, 71.

as continued states rather than new states through succession. This was despite the fact that the *de facto* annexation of these states was recognised by most of the international community after some initial hesitation.¹¹³

The questions that emerge are: What is the legal basis on which state identity/continuity is recognised? Can states reappear after their extinction in the past and claim immortality? In this connection, Marek, giving a normative value to the principle of effectiveness which is not supported by State practice,¹¹⁴ argues that 'there can be no continuity without identity ... unless a legal miracle is accepted'.¹¹⁵ On the other hand, Crawford proposes that 'identity without continuity', and hence a kind of 'resurrection' of the same legal entities, is possible in international law.¹¹⁶ From the point of view of Müllerson, the Baltic countries' sovereignty was restored due to the recognition of their independence by Western countries.¹¹⁷

This legal debate suggests that there is a growing consensus that the identity of states that were extinguished due to annexation should be considered to be preserved. For example, in 1990 when the Iraqi army occupied Kuwait,¹¹⁸ the international community rejected the invasion. Iraq's defiance led to military invasion under Resolution 678¹¹⁹ and Kuwait's identity was restored to what it had been prior to Iraq's incursions.

Werner Jakusch refined the theory of 'identity without continuity' by combining it with the Roman law concept of *postliminium*.¹²⁰ According to this principle, if during war a Roman citizen came under the power of an enemy

113 Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law*, (n 11) 17.

114 Enrico Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness Legality and Legitimacy* (Martinus Nijhoff Publishers 2006) 41–42.

115 Marek, (n 11) 6.

116 James Crawford, *The Creation of States in International Law* (Clarendon Press 1979) 402–03, 407–08.

117 Rein Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge 1994) 145; CN Alexandrowicz, 'New and Original States: The Issue of Reversion to Sovereignty' (1969) 45 *International Affairs* 474.

118 Arthur Goldschmidt, *A Concise History of the Middle East* (7th edn, Westview Press 2002) 395.

119 Adam Clymer, 'Congress Acts to Authorize War in Gulf' *New York Times* (New York, 13 January 1991) 1–2.

120 Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law*, (n 11) 19–20.

he sustained *diminutio capitis maxima*,¹²¹ and all his civil rights were in abeyance (*pendere*). Being captured by the enemy he became a slave, but his rights over his children if (he had any) were not destroyed. They were said to be in abeyance by virtue of the *jus postliminii*, i.e. the right to claim property after recapture. When he returned, his children were again in his power.¹²² According to this old Roman legal principle, the 'legal identity' of the prisoners of war was restored if they returned home after the war. In the legal context, prisoners were considered dead during the time of their disappearance but their status was changed soon after they returned. On the basis of a similar principle, Jakusch for instance rejected the continuity of Austria during 1938–1945 when it was annexed, but accepted that post-1945 Austria was the continuation of Austria as the same state. I argue that 'identity without survival' of a state is possible within international law, and that there are many explanations as to state 'continuity'. Further, it is impractical to claim *restitutio ad integrum*, i.e. restoration to original condition, in its entirety while ignoring the political and constitutional changes that have been carried out during the occupation through the incorporation process.¹²³ It is difficult to avoid the legal norms and political realities that came into being during the years of occupation. In the Baltic States, for example, the restored constitution was used as the basis of the new constitutional order but it was not itself the new constitutional order.¹²⁴ A full and unrestricted *restitutio ad integrum* can therefore rightfully be described as legal fiction.¹²⁵ This aspect of the Kashmir question will be discussed in Chapter 5.

Whether Recognition Can Cure Illegal Annexation/Occupation: Legal Consequences of State Continuity

Some international law scholars, keeping the illegal annexation cases in view, argue that unlawful invasion and occupation prevent the extinction of the annexed state. The principle of continuity and the restoration of historical title therefore find their applicability in situations where the territorial integrity

121 It means the loss of liberty, which included the loss of the city and of one's family. See, Charles Anthon, *A Manual of Roman Antiquities* (Harper & Brothers 1851) 142.

122 William Smith, *A Dictionary of Greek and Roman Antiquities* (John Murray 1875) <<http://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA/Law/home.html>> accessed 10 January 2017.

123 Müllerson, (n 117) 146; Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law*, (n 11) 289.

124 Partlett, (n 25) 514.

125 Van Elsuwege, (n 9) 381, 387.

of the state is disrupted by war, colonization, or belligerent occupation. In these circumstances, the state preserves its identity, which it possessed before it was disrupted by illegal means. Regarding the illegal annexations in places like Ethiopia, Austria, Albania, and Czechoslovakia, Marek derived the legal explanation for the survival of states through the principle of *ex injuria ius non oritur*, i.e. illegal acts do not create international law. Marek argues that it is this theory alone that provides a legal basis for the continued existence of illegally annexed or otherwise *de facto* extinguished states¹²⁶ that survive *de jure* despite occupation.¹²⁷ Mere recognition by other states of occupation is hence not the decisive factor when considering the question of the extinction of occupied States, as in the cases of Austria and Czechoslovakia.

However, it should be noted that the principle of *ex injuria ius non oritur* has been disputed in the past. Hans Kelsen denied the existence of this principle within international law.¹²⁸ The application of this principle was particularly problematic in relation to the WWII annexations of places like Austria, Czechoslovakia, and the Baltic States. In all these cases, occupation was *occupatio quasi bellica* and annexation took place through threats to use force rather than by a military conflict. The Baltic States, for example, were invaded by the Soviet Union in June 1940 following the conclusion of the Molotov-Ribbentrop Pact in 1939. This was a secret non-aggression agreement with secret supplementary protocols made with Nazi Germany.¹²⁹ Such agreements divided Eastern Europe into Nazi and Soviet spheres of influence.¹³⁰ The Soviet Union officially annexed all three Baltic States after the populations of the three countries were coerced by the Soviets into voting in favour of annexation. In the case of Latvia, for example, the instructions by USSR read, 'only the list of the Latvian Working People's Bloc must be deposited in the ballot box ... the ballot must be deposited without any changes'.¹³¹

¹²⁶ Marek, (n 11) 329.

¹²⁷ Van Elsuwege, (n 9) 377.

¹²⁸ H Kelsen, *Principles of International Law* (R.W. Tucker rev and ed, 2nd edn, Holt, Rinehart & Winston 1967) 316.

¹²⁹ Eastwood, (n 11) 316, fn 117.

¹³⁰ Esther B Fein, 'Soviets Confirm Nazi Pacts Dividing Europe' *New York Times* (New York, 19 August 1989) 1.

¹³¹ Soviet Occupation and Annexation of Latvia 1939–1940, Briefing Paper No. 02 (*Ministry of Foreign Affairs of the Republic of Latvia*, 16 August 2004) <<http://www.mfa.gov.lv/en/policy/information-on-the-history-of-latvia/briefing-papers-of-the-museum-of-the-occupation-of-latvia/soviet-occupation-and-annexation-of-latvia-1939-1940>> accessed 10 January 2017.

Members of the international community continued to recognise diplomatic representatives of the Baltic States in exile.¹³² The forcible annexations by the Soviet Union, on account of which the original government was overtaken by the occupation forces and made ineffective, were not recognized. It is one of the classical continuity rules that neither *occupatio bellica* nor measures taken by the occupying power lead to the extinction of the occupied state.¹³³ It is argued that the recognition of the state continuity of the Baltic republics clearly exemplifies that it is possible to apply the rules of belligerent occupation to quasi-belligerent occupation and thereby claim for restoration of title and state continuity. However, the prerequisite is that the situation should involve genuine illegality and threats to use force.

On the other hand, some authors believe that the principle of effectiveness (*ex factis oritur ius*: facts have a tendency to become law), remains central to the system of international law.¹³⁴ However, the significance of the principle of *injuria ius non oritur* in the illegal annexation cases is clear: impunity and the acceptance of illegal acts makes law meaningless. It would be counterproductive to rely on the principle of effectiveness as an exclusive criterion when deciding courses of action with regards to state continuity in the context of illegal annexations. The principle of effectiveness, *ex factis ius oritur*, which is a basic principle of international law, is framed in Article 38(1) (c) of the Statute of the ICJ. It states that the Court, in deciding the disputes submitted to it, should apply 'the general principles of law recognised by civilized nations'.¹³⁵ Accordingly, international justice requires taking both principles into consideration and deciding which one of the two is preferable in a particular conflict. Both of these principles are applicable, even if the former state is extinct or has been absorbed by the successor state. Modern practice has supported the proposition that statehood should not always be decided on the basis of effectiveness. This is because it is not simply the factual situation but the legally defined claim that matters.

As far as the principle of non-recognition of territorial conquest is concerned, it appeared for the first time as part of US foreign policy during President Herbert Hoover's administration (1929–33). This was in response to Japanese activities in the Far East during 1931–1933, particularly the Manchurian Crisis. Hoover adopted a policy of refusing to recognize political or territorial changes

132 Grazin, (n 1) 1402–03, 1407.

133 W Fiedler, 'Continuity', *Encyclopaedia of Public International Law* (1992) vol 1, 808.

134 Julius Stone, 'What Price Effectiveness?' (1956) 50 *American Society of International Law* 198, 198.

135 Statute of the International Court of Justice, 26 June 1945 (UNCIO XV, 355).

made in violation of international treaties. On 7 January 1932, after the US Secretary of State Henry L. Stimson received the news of Japan's unilateral seizure of Manchuria in north-eastern China, he sent notes to the governments of China and Japan.¹³⁶ The contents of the notes came to be called the Stimson doctrine. The doctrine affirmed:

The American Government deems it to be its duty to notify both the Government of the Chinese Republic and the Imperial Japanese Government that it cannot admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those governments ... which may impair ... the pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.¹³⁷

Hence, it became the US policy not to recognise the international territorial changes affected by the use of force.

In terms of the UN as a whole,¹³⁸ their understanding of the principle of non-recognition of title claimed after illegal annexation can be seen in the ICJ Advisory Opinion on Namibia from 1971.¹³⁹ After disposing with the other arguments the court stated, 'Member States of UN are ... under obligation to recognise the illegality and invalidity of South Africa's continued presence in Namibia'.¹⁴⁰

The Security Council reiterated this rule in Resolution 664 of 18 August 1990 by terming the annexation of Kuwait 'null and void'.¹⁴¹ Regional multilateral organisations, especially the League of Arab States and the Gulf Co-Operation Council, confirmed the UN non-recognition of Iraqi rule in Kuwait.¹⁴²

¹³⁶ Richard N Current, 'The Stimson Doctrine and the Hoover Doctrine' (1954) 59 *The American Historical Review* 513, 523.

¹³⁷ The Secretary of State (Henry L. Stimson) to the Consul General at Nanking (Peck), Washington, 7 January 1932, cited in *FRUS*, Herbert Hoover (1929–1933) 1932 Vol. III, 'The Far East' (1948) 7–8.

¹³⁸ Thomas D Grant, 'East Timor, the UN System and Enforcing Non-recognition in International Law' (2000) 33 *Vanderbilt Journal of Transnational Law* 273, 273.

¹³⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1971) ICJ Rep 54 & 56, para 118, 126.

¹⁴⁰ *ibid.*

¹⁴¹ UNSC Res 664 (18 August 1990).

¹⁴² UN Res 3036, 3 August 1990, para 1, U.N. Doc. S/21434 (Adopted at the Extraordinary Session of the Council of the League of Arab States, Cairo).

The question of recognition also appeared in the dissenting opinions of Judges Weeramantry and Skubiszewski in the *Case Concerning East Timor* in 1995.¹⁴³ They proposed that recognizing the territorial changes effectuated since 1975 by Indonesia on the island of Timor would be against the law.¹⁴⁴ Judge Weeramantry posited that an international rule regarding the recognition of claims over East Timor could have been deduced from UN practice towards the territory since 1975.¹⁴⁵ He further stated that the law has moved towards requiring that collective processes govern recognition, and that once the political organs of the UN establish a rule of non-recognition regarding a particular situation, that rule is binding *erga omnes*.¹⁴⁶ Skubiszewski, by contrast, took the standpoint that the duty of non-recognition flowed not from a collective decision as to the status of East Timor specifically, but from a general international rule of non-recognition of changes effectuated by the threat or use of force.¹⁴⁷ Under the contemporary international law, the principle of non-recognition is considered to be binding on U.N. Member States based on their obligation towards the U.N. General Assembly resolutions on non-recognition: namely the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Co-operation among States and the 1974 Resolution on the Definition of Aggression. These resolutions become binding on states through two mechanisms: first, by customary law involving evidence of general practice accepted by law, and two, by *opinio juris*: the subjective acceptance of the obligation on behalf of a state that it is bound by the law in question.¹⁴⁸ In the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, the ICJ elucidated the application of *opinio juris*:

The Court has, however, to be satisfied that there exists in customary international law an *opinio juris* as to the binding character of such abstention [of non-recognition]. This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled 'Declaration on Principles

143 *Case Concerning East Timor (Portugal v. Australia)* General List No 84 (1995) ICJ, 1.

144 Grant, (n 138) 304.

145 *Case Concerning East Timor (Portugal v. Australia)* General List No 84 (1995) ICJ, 202 (Dissenting opinion of J Weeramantry).

146 *ibid* 172.

147 *ibid* 262–63 (Dissenting opinion of J Skubiszewski).

148 Roger S Clark, 'The Timor Gap: The Legality of the "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia"' (1992) 4 *Pace Yearbook of International Law* 69, 80.

on International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'. The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves.¹⁴⁹

The majority view is that the annexation/occupation of the territory of a state as a result of the illegal use of force does not affect the legal existence of that state.¹⁵⁰ The decision by major players in the international community to not recognize that title over the Baltic States had passed to an occupier gave more credence to the principles of restoration of historical title and continuity of the states. After the disintegration of the Soviet Union, 15 republics formed. Russia became a successor state and was seen as a continuation of Soviet Union.¹⁵¹ The three Baltic republics (Estonia, Lithuania, and Latvia) were recognised as having retained their statehood under Soviet occupation for 51 years. These independent Baltic republics were seen as identical to those that existed from around 1920 to 1940. Western countries and the USA, using the Stimson doctrine, welcomed the restoration of the sovereignty and independence of the Baltic States and established diplomatic relations without delay.¹⁵²

From the above discussion it follows that under international law, the illegal annexation/occupation of a territory does not confer valid title to the occupier. Further, it is clear that the international community's non-recognition facilitates the reclamation of statehood by the annexed/occupied state and upholds state continuity.

The Significance of the Right to Self-determination on State Continuity

The concept of the right to self-determination will be discussed in detail in Part II. However, this section will explain the significance of the right to self-determination to state continuity. In this context, Alfred Verdross provided a

149 Case Concerning Military and Paramilitary In and Against Nicaragua (Nicaragua v. United States of America) General List No 14 (1986) ICJ, 89–90.

150 Crawford, (n 116) 407.

151 Rein Müllerson, 'The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia' (1993) 42 International and Comparative Law Quarterly 473, 475–80; Marc Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 American Journal of International Law 569.

152 Declaration of European Community foreign Ministers, Brussels, 27 August 1991; State Department Press Statement, Washington DC, 2 September 1991.

new theoretical basis for understanding state continuity in the context of 20th century developments relating to the non-recognition of illegal territorial acquisition, which was impossible to explain within the classical doctrine of the three elements of state. Verdross posited that the key factor in state identity is the population.¹⁵³ Tracing this concept back to Grotius, Verdross emphasised that the continuity of statehood is linked to continuity among the people.¹⁵⁴ With the development of the right to self-determination in the twentieth century, the nineteenth century principle of recognising the existence of nations as peoples—despite foreign occupation—gained further significance. This trend is also evident in the work of the UN, which gave priority to the right to self-determination in the resolution of the problem of continuity.¹⁵⁵

After Germany was defeated in WWII it was divided into occupation zones, each ruled by an Allied nation. In 1949, the two German states were formed (known as East and West Germany, respectively) and they became members of the UN at different times, recognising each other as States. However, within international law, there was a controversy as to the status of Germany after WWII. Kelsen believed that Germany had become extinct after its occupation.¹⁵⁶ Schweitzer, however, argued that under international law the German *Reich* had not perished.¹⁵⁷ Frowein asserted that the Federal Republic of Germany (FRG) had always viewed itself as the only legitimate continuation of the German *Reich*.¹⁵⁸ Further, Ebenroth and Kemner suggested that the dismemberment of the German *Reich* and subsequent rise of two new states, or the secession of the German Democratic Republic (GDR) and corresponding shrinking of the German *Reich* to the territory of the FRG, remained plausible constructions.¹⁵⁹

153 Quoted in Mälksoo, 'Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in the International Law', (n 11) 309.

154 Quoted in Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law*, (n 11) 33–34.

155 Fiedler, (n 133).

156 Hans Kelsen, 'The Legal Status of Germany to be Established immediately upon Termination of War' (1944) 38 *American Journal of International Law* 680.

157 Quoted in Markus G Puder, 'The Grass Will Not be Trampled Because the Tigers Need Not Fight—New Thoughts and Old Paradigms for Détente across the Taiwan Strait' (2001) 34 *Vanderbilt Journal of Transnational Law* 481, 502.

158 Jochen A Frowein, 'Current Developments: The Reunification of Germany' (1992) 86 *American Journal of International Law* 152, 157, fn 30.

159 Carsten Thomas Ebenroth and Matthew James Kemner, 'The Enduring Political Nature of Questions of State Succession and Secession and the Quest for Objective Standards' (1996) 17 *University of Pennsylvania Journal of International Economic Law* 753, 803.

Today, state practice recognises the unified Germany as being a continuation of the state that existed prior to the Second World War. This is particularly because the division of Germany took place in violation of the right to self-determination of its people. This is referred to in the Treaty on the Final Settlement With Respect to Germany 1990, which was signed by four of the five Permanent Members of the SC.¹⁶⁰ This treaty expressly states that the 'German people, freely exercising their right of self-determination, have expressed their will to bring about the unity of Germany as a State'.¹⁶¹ Mälksoo argues that the acceptance of the legal status of Germany within state practice demonstrates that after WWII, claims of statehood were accepted if backed by the fundamental norms of international law, such as the right to self-determination.¹⁶²

Plebiscites, which are a form of exercising the right to self-determination, have always played a significant part in cases involving the restoration of historical title. For example, plebiscites were conducted in some of the former Soviet Bloc states including Lithuania, Estonia, and Latvia.¹⁶³ On 16 March 1991, a referendum was held on the future of the Soviet Union in 9 of the 15 Union republics, which asked the populace whether the Soviet Union should be preserved as a renewed federation. The discussion about whether Scotland should become independent after its constitutional union with England in 1707¹⁶⁴

160 Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *The International and Comparative Law Quarterly* 857, 861.

161 Preamble to the Treaty on the Final Settlement with Respect to Germany, appears at (1990) 29 *ILM*. 1186.

162 Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law*, (n 11) 36–37.

163 Uibopuu, (n 6), 1053.

164 Neil MacCormick, 'Is There a Constitutional Path to Scottish Independence?' (2000) 53 *Parliamentary Affairs* 721, 721. Neil MacCormick in reference to Scotland's position within the UK, argues that it is possible that we have two interpretations this constitutional document (p 727). He argues that it is therefore possible that this union is 'equally constitutionally' dissolved by an appropriate measure, if the political 'will' in this context is exercised. (p 735) However, there are alternative views on the union of Scotland with England. Tierney argues that such an independence campaign has arisen because the union pact, stemming from 1707, had been undermined by subsequent UK constitutional practice, which went against the foundation of mutual national respect that was believed to have been guaranteed in the original union. Stephen Tierney, 'Giving with One Hand: Scottish Devolution within a Unitary State' (2007) 5 *International Journal of Constitutional Law* 730, 737. Walker states that the Treaty of Union 1707 was no single Act of Union, but two distinct Acts: Scottish and English, and which approved and ratified the Articles [of the Treaty of Union.] This view challenges the Treaty of Union 1707, and leaves open

continues, despite the 2014 referendum and Scotland's decision to remain in the United Kingdom.

Finally, needless to say, a plebiscite is not necessary for the restoration of historical title if the international community recognises the historical claim to the territory. However, in most cases, it is essential to determine the 'will' of the people to assert their historical claim. Usually, a referendum or plebiscite is used to serve this purpose.

The Concept of Statehood within International Law

After discussing the principle of restoration of historical title and its relation to state continuity, recognition, and self-determination, it is important to analyse how the reinstatement of statehood is linked with the restoration of the historical title in non-European entities such as the Princely State of Kashmir. This involves a discussion of what the concept of statehood itself entails. To this end, the two classical formulations of what it means to be a state – the declaratory theory, which holds that a state must fulfil the four criteria listed in Article 1 of the Montevideo Convention on the Rights and Duties of States (1933),¹⁶⁵ and the constitutive theory, which allows for a state to be 'created' through the recognition of other states¹⁶⁶ – are significant. However, Third World Approaches to International Law (TWAIL) scholars have criticized such classical formulations of the state for being subjectively based on Westphalian notions of statehood. Indeed, the subjectivity of statehood remains a highly underexplored and inconclusive issue within international law. This section picks up from this point and advances the notion that the understanding of statehood remains subjective and this existing lacuna is demonstrated by the treatment of Princely States such as Kashmir within international law, which remained unaddressed by the Decolonization Declaration of 1960. This Declaration only recognised territories across the waters as colonies and remained silent on issues of Princely States and neo-colonization by newly independent states like India and Pakistan.

the possibility to claim restoration of historical title. See, DM Walker, *A Legal History of Scotland* (T & T Clark 1996) 88.

165 'The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.' Article 1, Montevideo Convention on the Rights and Duties of States (signed on 26 Dec 1933, entered into force 26 Dec 1934) 165 LNTS 19; 49 Stat 3097.

166 Barry Sautman, 'Tibet's Putative Statehood and International Law' (2010) *Chinese Journal of International Law* 127, 131–32.

Within international law, confusing formulations such as the idea of an international protectorate, suzerain state, or protected/vassal state, were used in relation to the Indian Native or Princely States such as Kashmir. This was despite the fact that it was self-governing and had a special status within the British Empire due to the fact it was used as buffer against the other powers such as Czarist Russia.¹⁶⁷ In the case of *Island of Palma*, Judge Huber provided some distinction between international and colonial protectorates. Britain has made a similar distinction between 'protectorates' and protected States under the British Nationality Act 1948.¹⁶⁸ International protectorates fall into two categories. Those qualifying as States will be referred to as protected States, while those that do not qualify but still enjoy some separate legal personality shall be referred to as international protectorates.¹⁶⁹ It was believed that protected States could satisfy the requirements for being a State since a certain degree of actual dependence was acceptable.¹⁷⁰ Therefore, the prerequisites of the independence of the protected States were merely the retention of substantial authority in internal affairs, some degree of control over the exercise of foreign affairs powers, and that metropolitan competences be based on delegation by treaty or other instruments.¹⁷¹

The Indian Native states were seen to be under the suzerainty of a superior power that governed their international relations. The term 'suzerainty' is originally derived from feudal law. In modern international law, its meaning has been confusing¹⁷² when applied in relation to protectorates. In this context, Hall argues that the position of States under suzerainty differs from that of protectorates and submits that a presumption exists against them possessing any international capacity.¹⁷³ Traditionally, the relationship of suzerainty could be feudatory or conventional. In the feudal sense, the term suzerain meant lord paramount: one who had granted sovereignty over some defined territory to be held by him as a fief, and had accompanied the gift with an express grant of jurisdiction. States under the suzerainty of others are portions of the latter that, during a process of gradual disruption, have acquired certain powers that

167 William Digby, *Condemned Unheard: The Government of India and H.H. the Maharaja of Kashmir* (Indian Political Agency 1890) 8; Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights and the History of Kashmir* (Hurst & Company, London 2004) 11.

168 Crawford, (n 116) 286.

169 *ibid* 287.

170 *ibid* 288.

171 *ibid* 288–89.

172 *ibid* 321.

173 William Edward Hall, *A Treatise on International Law* (3rd edn, Clarendon Press, 1890) 31.

also characterise an independent community. In a conventional sense, the situation could be read as a treaty relationship established between two states, which and formed an 'unequal league' that permanently impairs the sovereign powers of the inferior party.¹⁷⁴ Traditionally, under the concept of suzerainty, the inferior power was absolutely precluded from all alliances with foreign powers, as such agreements were seen to potentially impair allegiance to the paramount or suzerain power.¹⁷⁵ However, this was not the case with Princely state of Kashmir, as it did maintain foreign relations with other neighbouring powers. This will be discussed in Chapter 4 in some detail.

Sometimes, Indian Natives States were also referred to as international protectorates, which were territories whose governments (having agreed to protection) that retained separate international status, but lacked in some respect the qualifications for statehood.¹⁷⁶ All Indian Native States were termed 'protectorates' for the sake of convenience. Some argue that no distinction was made with the Princely States such as Kashmir based on degree of authority and autonomy exercised over their external affairs.¹⁷⁷ However, the British Crown made their position clearer with the decolonisation of British India in 1947 and stated that the Indian Native States were free to accede to India or Pakistan or neither, because their status was merely regarded as municipal units of the Empire. Moreover, Section 7 of the India Independence Act 1947 only provided for the 'lapse' of suzerainty over the Indian States. As such, it is arguable that the Native States such as Kashmir that did not accede to India or Pakistan were rendered fully independent.¹⁷⁸ Under this special arrangement, the British government had an imperative and lasting obligation to protect the people in Princely States against serious misrule during the process of decolonisation.¹⁷⁹ Kashmir, however, became a victim to neo-colonisation by India and Pakistan during a time when they could have regained independence, as will be discussed later in Chapter 4. Given the complexities surrounding the determination of statehood of former colonies, a multidisciplinary case-by-case approach is best suited to the task.

174 Wallwyn PB Shephard, 'Suzerainty' (1899) 1 *Journal of the Society of Comparative Legislation* 432, 432–33.

175 *ibid* 437–38.

176 Crawford, (n 116) 294.

177 See Chapter 4 of this book.

178 Crawford, (n 116) 321–23.

179 Spencer Harcourt Butler, *India Insistent* (William Heinemann 1931).

Clearly, given that Kashmir did not choose to become a part of India or Pakistan after the British Empire relinquished control, we can assumed it made the legal choice to become a fully independent state.

While the topic of Native States and their relationship to their suzerain is often considered outdated in discussions of international law, it is essential to our study as it allows for an understanding of some of the concepts relating to the statehood of the former Princely State of Kashmir. In the context of the British Empire, India was governed by the Crown through the laws of Parliament and the Indian legislature, while the Princely States were under the suzerainty of the Crown but were for the most part governed by the absolute will of their Princes.¹⁸⁰ India was considered to be a protected State, while the Princely States were considered to be international protectorates or suzerains, as their hereditary monarchies were allowed to govern internal affairs to a significant degree.¹⁸¹ Despite the overlapping nature of the monarchical and colonial administrations, Kashmir retained its distinct status as a Princely State.¹⁸²

This case study of Kashmir therefore reveals how the classical formulations of statehood fail to take into account the complex trajectories of third world states. As such, it is not possible to conclusively lay down a general rule regarding the position of Indian Native states within international law, as the relationship with each such Princely State depended upon the special relationship it had with the suzerain power. Clearly, understanding the position of Kashmir as a Princely state requires looking both at and beyond international law formulations, particularly from the perspective of TWAIL scholarship.

Philosophical conceptualisations of statehood vary according to different schools of thought. Explaining the concept of existence, the German philosopher Hegel noted 'What is reasonable is real and what is real is reasonable'.¹⁸³ According to him, every entity that exists in reality is meaningful. Applying this philosophy to the existence of states, one can speak of a state as being real when its nature is actually apparent. For Hegel, reality is the whole truth: understood rationality. It is the totality and synthesis of all partial and limited truth.¹⁸⁴ Hegel focuses on existence in an abstract and impersonal manner,

¹⁸⁰ *ibid.*

¹⁸¹ Seema Kazi, 'Rape, Impunity and Justice in Kashmir' (2014) 10 Socio-Legal Review 14, 15.

¹⁸² Kak, (n 13) 68.

¹⁸³ Hegel quoted in Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law*, (n 11) 11.

¹⁸⁴ TZ Lavine, *From Socrates to Sartre: The Philosophical Quest* (Bantam Books 1985) 210.

which may not be totally applicable to the existence of all historical states. In cases where a state becomes extinct due to war or occupation, Hegel's theory would consider that to be the end of that state as it would not exist objectively.

Taking an existentialist perspective, the Danish philosopher Søren Kierkegaard argues that 'the paradoxical character of the truth is its objective uncertainty'.¹⁸⁵ From this perspective, an extinct state cannot exist without referring to its subjective existence. Kierkegaard's philosophy urges that personal articulation of being is the only way to find truth.¹⁸⁶ Applying this principle to extinct states, they can define their statehood according to their own standard of civilisation in their historical context, with a view to regaining it. Before the development of the standards of 'civilisation', which originated in Europe and were later applied throughout the world,¹⁸⁷ there were varying practices in different cultures and contexts. As Gong notes, non-European countries were considered to have inferior status in international law until they fulfilled the European standards.¹⁸⁸ The conventional requirements of statehood require a critical perspective because, as TWAIL scholars argue, they were largely developed by dominant powers.¹⁸⁹ TWAIL scholarship has three objectives: deconstructing and understanding international law on the basis that it was created to legitimize imperialism; conceptualising a new international order taking into account historically-victimised non-European states; and promoting development in third world countries.¹⁹⁰

Anghie points out that approaches to international law are traditionally rooted in a Westphalian understanding of sovereignty.¹⁹¹ He argues that while the Westphalian definition of sovereignty may provide for equality among Western states, it did not extend the same status to the non-Western world,

185 Søren Kierkegaard, *Concluding Unscientific Postscript* (David F Swenson & Walter Lowrie trans, Princeton University Press 1968) 183.

186 Quoted in Rebecca Rabkin, 'From Kierkegaard to Kennedy: Existentialist Philosophy in the Supreme Court's Decision in *Planned Parenthood v. Casey* and its Effect on the Right to Privacy' (2004) 31 *Hastings Constitutional Law Quarterly* 611, 629.

187 Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984) 3–4.

188 *ibid* 6.

189 Antony Anghie, 'LatCrit and TWAIL' (2011–12) 42 *California Western International Law Journal* 311, 312.

190 Makau Mutua, 'What is TWAIL?' [2000] *American Society of International Law* 31, 31.

191 Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard Journal of International Law* 1.

which was considered 'uncivilised and hence non-sovereign'.¹⁹² Such conceptualisations legitimized the actions of imperial powers, and the mechanisms that used sovereignty as pre-requisite disempowered non-European nations.¹⁹³ Self-determination claims are still disempowered by this, because of the need for legal standing before being able to bring disputes before certain international tribunals. Traditionally, the historical standards of non-European states were ignored and the sovereignty of those states was considered inferior compared to that of European states. Nonetheless, the reality is that non-European states existed. They not only defined, distributed, and regulated political power within their jurisdictions, they also had complete authority and were sovereign within their own systems of belief.

The *Palmas* Case clarifies beyond any reasonable doubt that 'peaceful and continuous display of state authority' is an important ingredient for the title to a territory,¹⁹⁴ and hence sovereignty. It is argued, in the context of extinct, colonial, and non-European states that the Hegelian concept of existence does not hold true. Keeping in view the philosophical discussion on existence, there is no simple response to the existence of states historically. Each historical state was therefore a sovereign within its own ideas and values of civilisation. Therefore, to understand the truth of extinct colonial states subjective analysis is necessary. As discussed, beyond the metaphysical discussion of reality of state, the existence of state as a legal person in terms of the declaratory theory is defined in Article 1 of the 1933 Montevideo Convention:

The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other States.¹⁹⁵

Further, Article 3 of this Convention states that 'the political existence of the State is independent of recognition by the other States. Even before recognition the State has the right to defend its integrity and independence'.¹⁹⁶

192 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2005).

193 Anghie, (n 189) 311, 315.

194 *Island of Palmas*, (n 15) 829.

195 Montevideo Convention on the Rights and Duties of States (signed on 26 Dec 1933, entered into force 26 Dec 1934) 165 LNTS 19; 49 Stat 3097.

196 Ilias Bantekas (ed), *Sweet & Maxwell's Statutes Series; Public International Law 2002/03* (Sweet & Maxwell 2002) 3, 3.

Consequently, recognition does not seem to be important for the creation of a State within the Montevideo Convention, hence the support of the declaratory recognition. However, as noted by the Canadian Supreme Court in case of Quebec's proposed secession, the success of secession would come through the recognition of the international community.¹⁹⁷ Indeed, non-recognition would frustrate the ability of a state to enter into relations with other states, so there is a practical overlap between declaratory and constitutive theories. These are among the so-called 'unwritten principles', which occur in both the domestic and international sphere that have a great deal of sway in self-determination claims.¹⁹⁸

In terms of the Montevideo Convention, the first important criterion for the existence of a state is the presence of 'a permanent population' inhabiting the territory. Such a population must be a stable community and may include several distinct groups of 'peoples', as opposed to a single people. Since the identity of the state is its population, they can decide the future of the territory.¹⁹⁹ In the cases of West Irian, East Timor, and Belize, the UN GA upheld the right to self-determination of the inhabitants of the territory, indicating that the wishes of the people take precedence in the disposition of their territories.²⁰⁰ Generally, due to the development of the concept of self-determination, international law recognises the existence of 'nations' and 'peoples' in spite of foreign occupation. In the context of Kashmir and the implementation of self-determination as a norm of international law, questions about demographic changes in Kashmir and the particular groups who are entitled to exercise self-determination must be seriously considered.²⁰¹

Another requirement for the Convention definition is a defined territory. A state is the 'territorially sovereign' institution of authority. Therefore, territory and territorial sovereignty are closely interrelated. While territory can exist without territorial sovereignty (*terra nullius*) the latter cannot exist without the former.²⁰² In the *Palmas* Case it was stated that territorial sovereignty

197 As quoted in Sautman, (n 166) 132.

198 David P Haljan, 'Negotiating Quebec Secession' (1990) 31 Rev. BDI 190, 215.

199 *Western Sahara*, (n 8) 122; Franck, (n 40) 697–98.

200 SKN Blay, (n 41) 450; Inge V Porter, 'Two Case Studies in Self-Determination: The Rock and the Bailiwick' (2003) 4 San Diego International Law Journal 339, 353–54.

201 Brian Farrell, 'The Role of International Law in the Kashmir Conflict' (2002–03) 21 Penn State International Law Review 293, 315.

202 David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 59.

involves exclusive authority in a certain geographical area.²⁰³ Accordingly, the most basic manifestation of a state's jurisdiction is the power exercised in regard to its territory.²⁰⁴ However, as noted by scholars such as Jure Vidmar, land has been divided among states and it is virtually impossible to make a claim for independence without territorial disputes arising.²⁰⁵ According to Vidmar, there are four ways for territorial integrity to pass to the seceding state: a waiver by the so-called parent state; consensual extinction of the parent state; international intervention to facilitate the transfer; or international recognition of unilateral secession.²⁰⁶ However, territorial disputes may not affect the statehood or sovereignty of the State and could be merely about defining borders, such as in the McMahon Line dispute between India and China.²⁰⁷

The existence of an effective government is another requirement of statehood within international law. To have an effective government means that there must be an organ within a state capable of 'establishing and maintaining a legal order throughout the territory' of the prospective state. It has been argued that a state attains statehood as soon as political organisation is established, which is when the public authorities become strong enough to assert themselves throughout the territories of the state without the assistance of foreign troops.²⁰⁸ The actual exercise of such authority becomes evident when the government is in a position to negotiate and conclude treaties, guarantee their implementation, and when they can be held responsible.²⁰⁹ As far as the capacity to enter into relations with the other states is concerned it is in a real sense a manifestation of statehood rather than a prerequisite for it.²¹⁰ A government with no power to shoulder its rights and obligations cannot function. However, the example of the Belgian Congo case suggests that the requirement of an effective government is less stringent than has been thought (at least in

203 *Island of Palmas*, (n 15) 838.

204 Manfred Lachs, 'The Development and General Trends of International Law in Our Times' (1980) 169 HR 9, 36.

205 Jure Vidmar, 'Territorial Integrity and the Law of Statehood' (2012) 44 The George Washington International Review 697, 707.

206 *ibid* 742.

207 Alastair Lamb, *The China-India Border: The Origins of the Disputed Boundaries* (OUP 1964) 9.

208 The Aaland Island Question: Report of the Committee of Jurists, LONJ, Special Supp No 3 (1920) 3, 8–9. It may be argued that for this reason Northern Cyprus cannot be considered as a state as it cannot assert its existence without the assistance of Turkish troops.

209 Marek, (n 11) 59.

210 Crawford, (n 116).

particular contexts).²¹¹ After the independence of Congo in 1960, its government was bankrupt and simply lacked control of even the capital city. This was followed by a humanitarian intervention in the form of troops and UN financial assistance, which became absolutely necessary.²¹²

In addition to the above criteria, it should also be noted that legitimate states cannot be created through *jus cogens* violations; the illegality would undermine any claim to legal recognition even through other criteria are fulfilled.²¹³ Statehood within international law means independence and sovereignty²¹⁴ in the relations with states.²¹⁵ The criterion of independence requires that a separate territorial and political entity possesses the legal capacity to act as it wishes, within the international law framework. It also means the absence of subordination—direct or indirect—of its legal capacity to the will of a third state or a group of states.²¹⁶ State practice has indicated that a state formed by secession, for example, has sufficient independence if it governs its territory effectively with ‘durable stability’ so that there is no probability of the former sovereign regaining its place.

When it comes to determining the statehood of former native states, the recognition of their statehood by other states is important.²¹⁷ During the process of decolonisation in the 20th century, a significant number of the states formed were widely recognised before their governments were independent and in control of the state territory effectively and with significant stability.²¹⁸ In such cases, state practice has allowed for a lower degree of effective control than is required under the traditional rules of international law. In fact, the recognition of Kashmir as a state is intertwined in 1947 Partition politics. Post-1947, after the annexation of Kashmir by India and Pakistan and the subsequent constitutional incorporation of Kashmir into the Union of India, its status was somewhat diminished. The non-representative government installed in Kashmir by India has passed pro-Indian legislation, and has diluted Kashmir’s historical recognition.²¹⁹ Nevertheless, the Kashmiri struggle for

²¹¹ *ibid* 44.

²¹² The UN Congolese Agreement on Financial Assistance (23 August 1960) 373 UNTS 327.

²¹³ Vidmar, (n 205) 704.

²¹⁴ Sovereignty is much abused word within the international law. See, Malanczuk, (n 60) 147.

²¹⁵ *Island of Palmas*, (n 15) 838.

²¹⁶ Raič, (n 202) 75.

²¹⁷ William E Butler, ‘Self-Determination, Ethnic Identity, and Comparative Law’ (2013) 8(1) *Journal of Comparative Law* 297, 303.

²¹⁸ Examples are Indonesia, Algeria and Guinea-Bissau.

²¹⁹ The State Constitution of Jammu & Kashmir is a key part of this entrenchment; for example, Articles 3 and 4 of the relationship with the Indian State.

self-determination and its people's attempts to retain their identity have always had international recognition.²²⁰

In fact, as pointed out above, in cases of illegal annexation/occupation the state may continue to exist as a legal entity despite lack of *de facto* control.²²¹ The Baltic States, for example, in some sense existed as states even when they were not independent. The diplomatic status given to these states throughout their occupation allowed them to regain their independent status within the international community with relative ease.

Accordingly, historical independence and the nature of its absence are both considerably important within international law when it comes to statehood. Kashmir's historical statehood and the fact that its status was diminished due to arguably illegal acts under international law (which are discussed in detail in Chapter 4) leaves significant room for reconceptualisation as well as the restoration of its statehood, even under the mainstream constructions of international law. As Vidmar asserts,

States do not emerge automatically as a matter of an objective fact upon meeting the statehood criteria. [The] [e]mergence of a new State is a political process regulated by international law. The crucial element in this process is a removal of the claim to territorial integrity of the parent State. A declaration of independence may become internationally accepted even where statehood criteria are not entirely satisfied.²²²

Clearly such acceptance of statehood is based on the political will of the international community, as in Bosnia, Kosovo, or East-Timor, particularly where there are human rights violations.²²³ In cases where there are widespread human rights violations, self-determination claims have prevailed over territorial integrity and sovereignty arguments.²²⁴ This can be seen in the Security Council's responses to the situation in Kosovo, which attempted to find a balance

220 See also, Fozia Nazir Lone, 'The Creation Story of the Kashmiri People' (2009) 21 *The Denning Law Journal* 1.

221 Crawford, (n 116) 49.

222 Vidmar, (n 205) 729.

223 Thomas W Simon, 'Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo' (2011–12) 40 *Georgia Journal of International and Comparative Law* 105, 114; Clark, (n 148) Staff, 'Bosnia-Herzegovina profile – Timeline' *BBC News* (London, 24 October 2016) <<http://www.bbc.com/news/world-europe-17212376>> <http://www.bbc.com/news/world-europe-17212376>> accessed 9 December 2016.

224 Khazir Shirammammadov, 'How Does the International Community Reconcile Territorial Integrity and Self-determination? The Case of Crimea' (2016) 4 *Russian Law Review* 77.

between respect for territorial integrity with the need for autonomy and the condemnation of human rights violations, with the predominant goal of ending the humanitarian crisis.²²⁵ As Henkin argues, in the human rights era the absolute inviolability of 'sovereignty' is a mistake that has been transmuted into an axiom of the inter-state system, which has become a barrier to international governance and to the realisation of human values.²²⁶

Part 2: The Right to Self-determination

The Magnitude of Self-determination in the UN Era

The right to self-determination is the right of a people to determine their own political destiny.²²⁷ This is mainly applicable to nationalist movements where people are 'united in a patriotic attachment to a shared set of political practices and values'.²²⁸ This concept was originally developed alongside the national awakenings of the collective consciousness of people throughout Europe and the United States in the eighteenth and nineteenth centuries.²²⁹ During that time in France and the United Kingdom, the focus was on political sovereignty as well as the protection of the liberty and rights of individuals based on law.²³⁰ This vital concept of self-determination has continued to play a major role in political and legal debates,²³¹ especially after the two world wars. The principles of self-determination expressed during the American and French Revolutions were based on the natural law rights of the people, which is the genesis of the modern expression.²³² Today, self-determination is a broad concept and is premised on allowing people to choose their own political status.

The right to self-determination took on heightened significance during the period of decolonisation and became its hallmark contribution in

225 UNSC, S/RES/1244 (1999) 10 June 1999.

226 Louis Henkin, 'Human Rights and State Sovereignty' (1995–96) 25 *Georgia Journal of International and Comparative Law* 31; See generally, Louis Henkin, 'The Mythology of Sovereignty' (1993) *American Society of International Law Newsletter*, 1.

227 Alina Kaczorowska-Ireland, *Public International Law* (4th edn, Routledge 2010) 574; Malcolm N. Shaw *International Law* (6th edn, CUP 2008) 251.

228 John Walker, 'Parizeau Slip in Old Tradition of Quebec' *EDMONTON J* (Edmonton, 5 November 1995) F8.

229 Musgrave, (n 105) 2.

230 Louis Leo Snyder, *The Meaning of Nationalism* (Greenwood Press 1954) 119.

231 Steiner and Alston, (n 19) 1248.

232 John A Collins, 'Self-Determination in International Law: The Palestinians' (1980) 12 *Case Western Reserve Journal of International Law* 137, 139.

international law.²³³ The post-WWII decolonisation process caused the European colonial empires to disintegrate all the way through to the end of the 20th century. This process influenced the development of the principle of self-determination.²³⁴

During the start of the UN era, the right to self-determination was readily accepted and developed in two distinct historical periods. From the 1940s to the 1960s, the decolonisation process was carried out within colonial borders. Any act that threatened the principle of *uti possidetis*,²³⁵ which protected the territorial integrity of colonies, was largely rejected. The fundamental concern of the UN during this era was to accelerate decolonisation and preserve the territorial integrity of the new states such that the unit of self-determination was described in territorial context as the 'whole population'.²³⁶ The term 'people' was conservatively construed as the 'population or inhabitants of a distinct territorial unit'.²³⁷

From the 1970s onwards, a secessionist view emerged that the right to self-determination could be exercised beyond the colonial borders and outside the classical approach in limited circumstances. In such situations, nationalist sentiments led to attempts to establish patriotic and almost familial bonds between the people and the state or group seeking secession.²³⁸ However, the secessionist claims based on self-determination in the post-colonial era have achieved limited results,²³⁹ with some succeeding mostly due to political expedience.²⁴⁰ However, remedial secession claims have been recognised by the international community, particularly in cases of gross human rights violations such as in Kosovo.²⁴¹

233 Gudmundur Alfredsson, 'Different Forms of and Claims to the Right to Self-Determination' in Donald Clark (ed), *Self-Determination- International Perspectives* (MacMillan Press 1996) 58, 60.

234 Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) 7.

235 Steven R Ratner, 'Drawing a Better Line: Uti Possidetis and the Borders of the New States' (1996) 90 *American Journal of International Law* 590.

236 Musgrave, (n 105) 151.

237 *ibid.*

238 Anthony D. Smith, *Nationalism in The Twentieth Century* (New York University Press 1979) 27.

239 Weller, (n 86) 114.

240 Canuel, (n 16) 87.

241 Simon, (n 223) 143.

*Self-determination – An Orthodox Approach: Decolonisation
within Colonial Borders; Recognition of People and Territorial
Integrity*

International law experienced an upheaval with the events in Europe during the 1930s and in the course of WWII. The allied powers were forced to focus on the issue of human rights. Therefore, while ideas and references to self-determination developed,²⁴² they were espoused primarily to solve the issue of 'peoples of ethnic communities, nations or nationalities distinguished by language and culture crisscrossing the lines of the existing political entities'.²⁴³ The Atlantic Charter of 1941²⁴⁴ proclaimed self-determination as the general standard governing territorial changes, as well as a principle concerning the free choice of rulers in sovereign states. Both President Roosevelt and Prime Minister Churchill declared, *inter alia*, that they wanted 'no territorial change that is not in accord with freely expressed wishes of the people concerned', that they respected 'the right of all peoples to choose the form of government under which they will live', and that they wished to see 'sovereign rights and self-determination restored to those who have been forcibly deprived of it'.²⁴⁵ However, Churchill interpreted the provision on the right to self-determination in the Atlantic Charter in a very limited manner to the House of Commons on 9 September 1941.²⁴⁶ According to him, self-determination was only applicable in the context of Nazi aggression.²⁴⁷ He made self-determination inferior to the more institutionalised international principles, like state sovereignty and territorial integrity.²⁴⁸

242 Joseph Pestieau, 'Minority Rights: Caught Between Individual Rights and Peoples' Rights' (1991) 4 *Canadian Journal of Law and Jurisprudence* 361, 365.

243 Anthony Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 *International and Comparative Law Quarterly* 99, 100–01.

244 This Charter was drafted by President F.D. Roosevelt & Prime Minister W. Churchill and was made public on 14 August 1941.

245 Daniel Thürer, 'Self-Determination', *Encyclopaedia of Public International Law* (2000) vol. iv, 365. The provisions of the Atlantic Charter were restated in the Declaration of UN signed in Washington on 1 January 1942 and in the Moscow Declaration of 1943.

246 Parliamentary debates, Fifth Series, vol. 374, *House of Commons, Official Report*, 8, Session 1940–41, 68–69.

247 Erich Hula, 'National Self-Determination Reconsidered' (1943) 10 *Social Research* 1.

248 Porter, (n 200) 344–45.

*The United Nations Charter (UNC): Self-determination in the Context of Decolonisation*²⁴⁹

The political hypothesis of self-determination entered into the realms of international law in the final draft of UNC²⁵⁰ and appeared in Articles 1(2) and 55. Article 1(2) of the UNC stated that the purpose of the organisation was 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'.²⁵¹ Article 55 focuses on the 'creation of conditions of stability necessary for peaceful and friendly relations, based on respect of principle of equal rights and self-determination of people'. The self-determination provisions in the UNC revolved around achieving friendly relations.²⁵² Under the UNC Article 73, the Members of the UN assumed responsibility for the administration of non-self-governing territories (NSGTs). These were the territories whose peoples have not yet attained full self-government. The administering powers accepted the obligations to promote the well-being of the inhabitants of these territories, develop self-government, and take due account of their political aspirations.²⁵³ There has, however, been some contention as to how this NGST status is understood by regional bodies, such as with regards to the issue of whether an NGST can also be a territory under belligerent occupation.²⁵⁴ Regardless of these issues, however, the NGST status is recognised globally.

In the decade that followed WWII, the principle of self-determination started to change in a manner that the drafters would have never imagined. At the Bandung Conference of 1955, newly-independent Asian and African states²⁵⁵ advocated outright anti-colonial self-determination.²⁵⁶ The Conference agreed

249 See generally, Lone, (n 220).

250 United Nations, *Charter of the United Nations* (Adopted in San Francisco in 26 June 1945 and entered into force on 24 October 1945) 1 UNTS XVI.

251 UNGA Res 217 A (III) (10 December 1948) UN Doc A/810.

252 Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: the Accommodation of Conflicting Rights* (University of Pennsylvania Press 1990) 33.

253 Grant, (n 34) 176; Crawford (n 116) 602; Julian Aguon, 'On Loving the Maps Our Hands Cannot Hold: Self-Determination of Colonized and Indigenous Peoples in International Law' (2010–11) 16 UCLA Asian Pacific American Law Journal 47, 49.

254 For example, in the understanding of the Western Sahara situation and the European Commission: Eugene Kontorovich, 'Economic Dealings with Occupied Territories' (2014–15) 53 Columbia Journal of Transnational Law 584, 611, 614.

255 The Bandung Conference was organized by Egypt, Indonesia, Burma, Ceylon (Sri Lanka), India and Pakistan and held in Bandung (Indonesia) from 18–24 April 1955.

256 MV Krishnan, 'African Contribution to the Development of the Principle of Self-Determination' (1966) 5 African Quarterly 312–23.

and declared that colonialism was atrocious in all its manifestations. In a historic speech, the then-Prime Minister of India, Pundit Nehru, opposed aggression and claimed that 'there was a war if there was aggression'.²⁵⁷ This Conference, hence, uncovered the link between the right to self-determination of peoples and human rights violations. It is argued that the open remark made by Prime Minister Nehru on aggression binds India to his 'unilateral declaration'. Such a declaration is equally applicable on the Kashmir question, as will be discussed in Chapter 6.

For the purposes of self-determination, the definition of 'people' under the UNC remains controversial. As will be discussed, the term 'people' is defined by the 'essence' of groups that have achieved self-determination.²⁵⁸ In general, the term 'people' has been equated with 'states',²⁵⁹ although the Drafting Committee for the UNC expressly made it clear that Article 1(2) 'extends to states, nations and peoples'.²⁶⁰

As mentioned, during the 1950s the right to self-determination was developed mostly to deliver independence and put an end to colonisation. Decolonisation was largely completed within colonial borders through the application of the principle of *uti possidetis*, which favored the stability and the finality of the colonial borders and as such, protected the territorial integrity and sovereignty of the decolonising entity.²⁶¹ The essence of *uti possidetis* is that 'new states will come to independence with the same boundaries they had when they were administrative units within the territory or territories of a colonial power'.²⁶² Furthermore, the jurisprudence of the ICJ suggests that it has consistently relied on three of these justifications in cases of territorial

257 GM Kahin, *The Asian-African Conference* (Cornell University Press 1956) in 'Modern History Sourcebook: Prime Minister Nehru: Speech to Bandung Conference Political Committee, 1955' <<http://www.fordham.edu/halsall/mod/1955nehru-bandung2.html>> accessed 4 April 2006.

258 W Ofuatey-Kodjoe, *The Principle of Self Determination in International Law* (Nellen Publishing Co 1977) 151.

259 Hans Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems* (Stevens 1951) 52; Rosalyn Higgins, *Problems and Process – International Law & How We Use It* (Clarendon Press 1994) 111; Lone, (n 220) 14.

260 (1945) 6 UNCIO, 704.

261 Fozia Nazir Lone, 'Uti Possidetis Iuris', *Oxford Bibliographies Online: International Law* (OUP 2012); P Mweti Munya, 'The International Court of Justice and Peaceful Settlement of African Disputes: Problems, Challenges, and Prospects' (1998) 7(1) *Journal of International Law and Practice* 159.

262 Malcolm N Shaw, 'The Heritage of States: The Principle of *Uti Possidetis Juris* Today' (1996) 67 (1) *British Yearbook of International Law* 75, 97.

disputes and maritime delimitation related to deconisation, namely *uti possidetis*, treaty law, and effective control.²⁶³

In the *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)*, the ICJ held that territorial status quo is essential to preserve what has been achieved by people who have struggled for their independence.²⁶⁴ In cases of a boundary dispute related to a colonial administrative treaty or maritime agreement,²⁶⁵ the principle of *uti possidetis* was given legal effect by the court.²⁶⁶ Over the years the principle of *uti possidetis* has been stretched beyond its application to postcolonial borders in order to maintain the finality of borders in other situations, such as territorial breakups (for example, in the Former Yugoslavia).²⁶⁷ From the perspective of *uti possidetis*, the meaning of 'people' under the UNC was limited in territorial terms given that it is mainly based on 'classical theory'.²⁶⁸ However, there were exceptions, such as the partition of British India where nationhood was attained on the basis of the 'romantic theory'.²⁶⁹

During the decolonisation period, plebiscites remained the best way of determining the future of colonized peoples. UN GA Resolution 637 (VII) of 1952 encouraged that 'the wishes of the peoples be ascertained through plebiscites or other recognised democratic means'.²⁷⁰ The Security Council voiced its

263 See generally, Brian Taylor Sumner, 'Territorial Disputes at the International Court of Justice' (2004) 53 *Duke Law Journal* 1779.

264 *Case concerning the Frontier Dispute (Burkina Faso v. Republic of Mali)* ICJ Reports (1986): 554–651 at para 25.

265 See generally, Marcelo Kohen, *Uti Possidetis and Maritime Delimitations* (UN Audiovisual Library of International Law 2008).

266 *Sovereignty over Certain Frontier Land (Belgium v. Netherlands)*, ICJ Reports (1959): 209–32; *Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)*, ICJ Reports (1962): 6–38; *Land, Island, and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening)*, ICJ Reports (1992): 351–618; *Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea Intervening)*, ICJ Reports (2002): 303–422; *Case concerning the Frontier Dispute (Benin v. Niger)*, ICJ Reports (2005): 90–151; *Case concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, ICJ Reports (1982): 18–94; *Case concerning Kasikili/Sedudu Island (Botswana v. Namibia)*, ICJ Reports (1999): 1045–1109; *Case concerning Maritime Delimitation and Territorial Question between Qatar and Bahrain (Qatar v. Bahrain)*, ICJ Reports (2001): 40–118.

267 Lone, (n 261).

268 Lone, (n 220) 13.

269 The 'classical' and 'romantic' labeling of self-determination theories is adopted from Koskeniemi, (n 18) 249–50. Also see A Hastings, *The Construction of Nationhood, Ethnicity, Religion and Nationalism* (CUP 1997) 14–18, 35–65.

270 UNGA Res 637 (1952) 4 GAOR 113.

support for Kashmiri self-determination and recognized the need for a plebiscite.²⁷¹ The resolution also called for the withdrawal of armed Pakistani tribesmen and the reduction of Indian forces to the minimum necessary.²⁷² Unfortunately, such a plebiscite has still not taken place. This issue will be discussed in detail in Chapter 6.

On 9 May 1956, a plebiscite took place under the supervision of the UN Plebiscite Commissioner in British Togoland.²⁷³ It was decided by the population of British Togoland to merge with the Gold Coast (now Ghana). This was followed by the plebiscites in the British Cameroons, in which the northern part voted to unite with Nigeria and the southern part decided to integrate with Union Republic of Cameroon.²⁷⁴ These examples, as well as those given above, show the international community's ability to facilitate such plebiscites, but that there is a requirement for them to negotiate with the occupying power.

Resolution 1514 (XV): Self-determination within Territoriality

A key step in self-determination becoming a legal right was when the UN adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples by GA Resolution 1514(XV) (hereinafter cited as 'the Declaration').²⁷⁵ The Declaration provided for the legal basis for the implementation of the UN's decolonisation policy, with plebiscites and elections being used as ways to determine the will of the people. According to this Declaration, people entitled to self-determination could cast off their imposed governments and determine their political status through the exercise of their collective will.²⁷⁶ The main intention of this Declaration was to emphasise 'the necessity of bringing a speedy and unconditional end to colonialism in all its forms and manifestations'.²⁷⁷ That said, this Declaration was meant to apply strictly to European colonies²⁷⁸ and not to ethnic or linguistic minorities living within such territories. Paragraph 6 of this Declaration prohibits any attempt to disrupt, partially or totally, the national unity and the territorial integrity of a country

271 UNSC Res 47 (1948) SCOR, 3rd Sess UN Doc. S/726.

272 Farrell, (n 201) 299.

273 UNGA Res 944 (X) (15 December 1955).

274 UNGA Res 1569 (XV) (9 May 1961); Plebiscite in Spanish Guinea on 11 September 1968; Plebiscite in West Irian in June 1969 by Virtue of Indonesian-Dutch Agreement of 1962).

275 UNGA Res 1514 (XV) (14 December 1960).

276 Steiner and Alston, (n 19) 1256.

277 UNGA Res 1514 (XV) (14 December 1960), Preamble.

278 Ijaz Hussain, *Kashmir Dispute: An International law Perspective* (Quaid-i-Azam University 1998) 145; C Lloyd Brown-John, 'Self-Determination, Autonomy and State Secession in Federal Constitutional and international Law' (1999) 40 South Texas Law Review 567, 591.

and deems it contrary to the UNC principles.²⁷⁹ In this context, the Declaration corresponds with the international principles of territorial integrity, the inviolability of state borders, sovereignty, and *uti possidetis*.²⁸⁰ As discussed in the previous section, according to the *uti possidetis* principle, states emerging from colonisation presumptively inherit the colonial administrative borders after independence.²⁸¹ Under this Declaration, no consideration was given to disparate cultures, religions, or languages when defining 'people'. It was believed that these 'peoples', through the process of nation-building, would overcome these differences.²⁸² The sanctity of *uti possidetis* was held to be paramount and the UN became very reluctant to permit any partition of the NSGTs, irrespective of their different constituent ethnic minorities or religious groups.²⁸³

In keeping with this guiding principle the GA approved the transfer of West Irian by the Netherlands to Indonesia, even though the population of West Irian differed significantly from that of Indonesia in terms of race, ethnicity, language, and culture.²⁸⁴ In the dispute over Mayotte between the GA and France, the latter refused to return the Island to the independent Comoros Islands.²⁸⁵ France conducted a referendum in the Mayotte in which 99.4 per cent of the population voted to remain with France.²⁸⁶ The GA adopted Resolution 31/4 of 21 October 1976, condemning France's action and declared the referendum 'null and void'.²⁸⁷ The UN hence denounced the intervention and the splitting of the colony before independence.²⁸⁸

279 UNGA Res 1514 (XV) (14 December 1960), Preamble & Para 6.

280 Ratner, (n 235); *Sovereignty over Certain Frontier Land* case [1959] ICJ Rep 240 & 255.

281 Frontier Dispute, *Burkina Faso v. Republic of Mali* (1986) ICJ Reports 565. In this case the ICJ established that the principle of *uti possidetis* constitutes a general principle and logically relates to the achievement of independence wherever it occurs.

282 John P Humphrey, 'Preventing Discrimination and Positive Protection for Minorities: Aspects of International Law' (1986) 27 *Cahiers de Droit* 23, 25.

283 Aguon, (n 253) 49; Suzanne LaLonde, 'Uti Possidetis: Its Colonial Past Revisited' (2001) 34 *Rev. BDI* 23, 26.

284 UNGA Res 1752 (XVII) (21 September 1962).

285 Michla Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (Martinus Nijhoff 1982) 30–31.

286 *ibid* 98.

287 See, Para 3 of UNGA Res 31/4 (21 October 1976) UN Doc A/RES/31/4.

288 Yash Ghai, 'Reflections on Self-Determination in the South Pacific' in Donald Clark and Robert Williamson (eds), *Self-Determination- International Perspectives* (The Macmillan Press 1996) 174–99, 182.

However, there have been a few situations in which the international community ignored the principle of *uti possidetis*, like Ruanda-Urundi²⁸⁹ and Micronesia.²⁹⁰ Likewise, the GA accepted the division of a single NSGT into Gilbert and Ellice Islands, two independent states,²⁹¹ and they adopted more flexible approaches to certain difficult situations (for better or worse) as in the partition of Palestine.²⁹²

The Declaration also affirmed that the alien subjugation, domination, and exploitation of peoples constitute denials of fundamental human rights and are contrary to the UNC.²⁹³ Interestingly, 'alien subjugation' was meant to apply to European colonies alone. According to this Declaration, an entity was a 'colony' if it was under foreign domination and geographically separated from the colonising power.²⁹⁴ This Declaration, therefore, had no provisions for stopping non-European neighbouring states (historically colonies themselves, such as India and Pakistan) from annexing former European colonies 'as fair prey'.²⁹⁵ Examples of this are the annexations of East Timor by Indonesia; Western Sahara by Morocco; and Goa, Pondicherry, and the Princely States of Hyderabad and Kashmir by India. On 18 December 1961, Mr Jha, an Indian delegate, addressed the Security Council²⁹⁶ about India's military occupation of Goa, which was an NSGT.²⁹⁷ Jha argued that it was a colonial question rather than an invasion.²⁹⁸ He also said:

289 Referendum was conducted on 18 & 25 September 1961 in Rwanda-Burundi under UN Res 1579 (XV) (20 December 1960) UN Doc A/RES/1579(XV) & UN Res 1605 (XV) (21 April 1961) UN Doc A/RES/1605(XV).

290 Micronesia and Marshall became the members of the UN on 17 September 1991 and were admitted to the UN pursuant to the UNGA Res 46/2 (17 September 1991) UN Doc A/RES/46/2 & UNGA Res 46/3 (17 September 1991) UN Doc A/RES/46/3.

291 UNGA Res 32/23 (28 November 1977) UN Doc A/RES/32/23.

292 Thompson, (n 86) 295.

293 UNGA Res 1514 (XV) (14 December 1960), para 1.

294 Glenn T Morris, 'International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples' in M Annette Jaimes (ed), *The State of Native America: Genocide, Colonization and Resistance* (Race & Resistance Series, Boston, South End Press 1992) 55, 74.

295 Hannum, (n 252) 37.

296 UN Doc S/50, 30; *Case Concerning Right of Passage over Indian Territory (Portugal v. India)* (1960) ICJ Rep 6.

297 UNGA Res 1542 (XV), 948th mtg, (15 December, 1960).

298 UNGA Res 1542 987th Mtg Para 41–43, 60–62.

This is a matter of faith with us. Whatever anyone else may think, Charter or no Charter, Council or no Council, that is our basic faith, which we cannot afford to give up at any cost.²⁹⁹

It is regrettable to note that the people of these well-defined former colonies were not seen as having the right to self-determination if a European colonial power was not involved, and were not given their proper historical borders (but rather remained trapped in colonial constructs).³⁰⁰ It is also unfortunate that the UN generally did not recognise these 'abandoned colonies' or 'entities' as colonies and hence their rights under UN Charter were not protected. The Declaration (Resolution 1514) did not regulate the issue of decolonisation of abandoned colonies/entities like Kashmir, and it can be argued that it instead created inequality among colonial territories.

The involvement of the ICJ assisted in the resolution of certain situations concerning abandoned colonies. For example in the case of East Timor,³⁰¹ a former abandoned European colony, their 'inalienable right to self-determination'³⁰² was recognized after it was occupied by Indonesia, a non-European State. It was affirmed that the people of East Timor had never been able to exercise their right of self-determination under Resolutions 1514 and 2625.³⁰³ Likewise in the *Western Sahara*³⁰⁴ case, the ICJ rejected the 'historical claims' of Morocco and Mauritania to the former Spanish Sahara, indicating that the wishes of the people take primacy.

The Non-Self-governing Territories & the UN List

In 1960, the GA adopted Resolution 1541, which set forth 'principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter' and whether or not a territory is an NSGT. This Resolution helps to ascertain whether an NSGT has achieved 'a full measure of self-government' and emerged as a sovereign independent state, free from association or integration with another independent state.³⁰⁵ This Resolution was mainly devised to provide NSGT status to territories where the administering power had not voluntarily agreed to

299 UNSC 16th Sess., 987th mtg, 9.

300 Cassese, (n 7) 82–84.

301 *Portugal v. Australia*, ICJ, General List No. 84, 30 June 1995, 90.

302 UNSC Res 384 (22 December 1975).

303 Musgrave, (n 105) Preface.

304 [1975] ICJ Rep 12, 68 para 162.

305 UNGA Res 1541 (XV) (5 December 1960) UN Doc A/RES/1541(XV), Annex, Principles VI.

the designation. This protection was further expanded by The 1970 Declaration on Friendly Relations (GA Resolution 2625).³⁰⁶ Indeed some scholars argue that development brought Resolutions 1514 and 1541 on self-determination into the realms of customary international law and engaged all states, willing or otherwise.³⁰⁷

The process of decolonisation, assisted by Resolution 1541, gradually extended the principle of self-determination to all colonial territories.³⁰⁸ It was the responsibility of the administering power to develop self-government and take due account of the political aspirations of the people.

In principle, this Resolution benefited only the 'blue water'³⁰⁹ colonies, and not those countries colonised on the basis of the 'Belgian thesis', which stipulates colonisation across contiguous borders.³¹⁰ However, as discussed in the previous section there were some exceptions, like East Timor.

The main foundation for granting 'self-government' was laid down in the UN List of Factors in 1953³¹¹ and Resolution 1514 (XV) in 1960.³¹² It was followed by Resolution 1654 (XVI) of 1961, which called upon all states administering a trust or NSGT to take action without any further delay and implement the Declaration³¹³ of 1960 unconditionally. In 1975, the GA in Resolution 3420 (XXX) approved the chapter of the report of the Special Committee regarding the Implementation of the Declaration on the Granting of Independence to

306 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV) (Oct 24, 1970).

307 Aguon (n 253) 50, citing Maivan C Lam, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Transnational Publications 2000) 124; and Antonio Cassese, *International Law* (OUP 2005) 47.

308 This process was endorsed by the International Court in *Namibia* Opinion found in ICJ Reports 1971, 54 & 56, para 118 & 126; [1975] ICJ Rep 12.

309 Rachel San Kronowitz, Joanne Lichtman, Steven Paul McSloy and Matthew G Olsen 'Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations' (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 507, 591.

310 Robert A Williams, *The American Indian in Western Legal Thought. The Discourses of Conquest* (OUP 1990) 327, n 14.; Bruce Robbins, 'Blue Water: A Thesis, OCEANAMERICA(S)' (2015) 8(1) Review of International American Studies 47–66.

311 UN Res 742 (VIII) (27 November 1953).

312 These Resolutions were further supplemented by UNGA Res 1541(XV) (5 December 1960) UN Doc A/RES/1541(XV) and Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) UNGAOR 25th Session Supp No. 28 UN Doc A/8028 (1970).

313 UN Res 1654 (27 November 1961) para 2.

Colonial Countries and Peoples (hereinafter the Special Committee on Decolonisation) relating to the information from NSGTs transmitted under Article 73e of UN Charter.³¹⁴ This Resolution reaffirmed that the administering power concerned should continue to transmit information under Article 73(e) of the Charter, with regard to NSGTs in the absence of a decision by the GA,³¹⁵ which was confirmed by the GA in 1986 in Resolution 41/13. The GA continued to pass more Resolutions, including 43/47,³¹⁶ 46/181,³¹⁷ and 55/146,³¹⁸ with the aim of eradicating colonialism.

Under Resolution 1541, the Assembly declared or reinstated certain territories as NSGTs, despite the resistance shown by administering powers.³¹⁹ For example, on 2 December 1986 the Special Committee on Decolonisation re-inscribed New Caledonia (unilaterally removed from the list of NSGTs by France in 1947) on the UN list of NSGTs, hence reaffirming the right to self-determination of its people.³²⁰ Removal from the list did not necessarily mean that a territory was no longer an NSGT in terms of its legal status, as the UK acknowledged in the case of Hong Kong.³²¹ Therefore, it is clear all the territories that were removed unilaterally, like New Caledonia and Hong Kong, continued to be an NSGT even though the administering power did not provide reports under Article 73(e).³²² In the light of such evidence of there being a substantive approach to deciding whether a territory has such a status, the approach to the abandoned territory of Kashmir, which was not placed on the NSGT list, could potentially need re-evaluation, which will be carried out in Chapter 4.

³¹⁴ UN Res 3420 (XXX) (8 December 1975) 2431st mtg, para 1.

³¹⁵ UN Res 1970(XVIII) (16 December 1963); UN Res 3293 (XXIX) (13 December 1974).

³¹⁶ UNGA Res 43/47, 59th Plen Mtg (22 November 1988) para 1 & 2.

³¹⁷ UNGA Res 46/181, 78th Plen. Mtg, (19 December 1991).

³¹⁸ UNGA Res. 55/146, 83rd Plen. Mtg (8 December 2000).

³¹⁹ Grant, (n 34) 176; Admission of New Caledonia without the consent of France, GA. 41A, U.N. GAOR, 40th Sess. Supp. No. 53, 92 Plen.mtg at 225 UN Doc. A/40/53, at 49 (1986).

³²⁰ UNGA Res 41/41A (2 December 1986).

³²¹ The Letter from the UK Permanent Representative to the UN to the Secretary General of the UN, 19 December 1972. Nihal Jayawickrama, 'The Right of Self-Determination' in Peter Wesley-Smith (ed), *Hong Kong's Basic Law: Problems and Prospects* (University of Hong Kong 1990) 85, 91–93.

³²² French Somaliland (now Djibouti) and the Comoros, which were removed and re-inscribed in 1965 and 1972 respectively. See, Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination' (1995) 66 British Yearbook of International Law 283, 292, fn 45.

*Self-determination Outside the Classical Approach:
Decolonisation Outside Colonial Borders*

From the late 1960s through to the 1970s, treaty law regarding the right to self-determination was significantly developed and modified.³²³ This process is evident in the UN adopting the International Covenant on Civil and Political Rights³²⁴ (hereinafter ICCPR) and the International Covenant on Economic, Social, and Cultural Rights³²⁵ (hereinafter ICESCR). It was followed by the adoption of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 1970 (hereinafter the Friendly Relations Declaration) as Resolution 2625(XXV).³²⁶ This advancement went beyond the classical approach and entitled people to self-determination on the basis of human rights violations, liberation of occupied territories, parting from a state practicing massive discrimination,³²⁷ and separation by agreement, like national divorce in the Soviet Union, Czechoslovakia, and Ethiopia/Eritrea.³²⁸

During the post-colonial era, there was a tide of nationalist movements and re-awakened self-identity by ethnic minorities.³²⁹ However, the right to self-determination was still a limited principle and not all peoples were seen as entitled to it³³⁰ due to the fear that allowing more claims for self-determination could allow minorities to easily separate and disband from their pre-existing states, creating massive destabilization.³³¹ For this reason, the meaning

323 M Cherif Bassiouni, 'The Perennial Conflict between International Criminal Justice and Realpolitik' (2006) 22(3) Georgia State University Law Review 541, 548.

324 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

325 International Covenant on Economic, Social, and Cultural Rights, (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

326 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970)' UNGAOR 25th Session Supp No. 28 UN Doc A/8028 (1970).

327 *ibid*; Vienna Declaration and Programme of Action, World Conference of Human Rights (adopted on 25 June 1993).

328 James Crawford, 'State Practice and International Law in Relation to Secession' (1998) British Yearbook of International Law 85.

329 Peter S Canellos, 'Nationalistic Stirrings a Recipe for Extremism: U.S. Should Play Role in Stopping Bloodshed' (ARIZ. REPUBLIC 1995) at H1.

330 Mitchell A Hill, 'What the Principle of Self-Determination Means Today' (1995) 1 ILSA Journal of International and Comparative Law 119, 132.

331 Nanda (n 23) 350.

of 'peoples'³³² for the purposes of the right to self-determination³³³ has undergone a dramatic reinterpretation under the international law³³⁴ and claims for independence have been largely been disallowed.³³⁵ As discussed in Chapter 1, the recognition of secession has been seen by some countries as potentially enflaming conflicts at home.³³⁶ It is precisely for this reason that states have expressed anxiety about recognizing secession, as in the case of Kosovo.³³⁷ Some scholars have expressed qualms about the recognition of Kosovo's secession on the basis that after the fall of the Milosevic regime, there would be a democratizing regime in Belgrade, which would dampen claims for self-determination by Kosovar Albanians.³³⁸ There have also been warnings against recognizing Kosovo's unilateral secession without a resolution from the United Nations Security Council as this may otherwise create a dangerous precedent.³³⁹ Likewise, Slomanson raises similar arguments for the non-recognition of Abkhazia and South Ossetia within international law, describing them as 'international proxy wars' between western nations and Russia.³⁴⁰ He describes Russian recognition of South Ossetia and Abkhazia³⁴¹

332 Morton H Halperin et al., *Self-Determination in the New World Order* (Carnegie Endowment for International Peace 1992) 47–48.

333 Efren Rivera-Ramos, 'Self-Determination and Decolonisation in the Society of the Modern Colonial Welfare State' in William Michael Twining (ed) *Issues of Self-Determination* (Aberdeen University Press 1991).

334 See Richard F. Iglar, 'The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia and Croatia's Right to Secede' (1992) 15 *Boston College International and Comparative Law Review* 213, 222.

335 Halberstam, (n 23) 575.

336 Charlotte Hille, 'Recognition of South Ossetia and Abkhazia two years later: Unicum or trendsetting?' (2010) 21 *Security and Human Rights* 153, 153.

337 Staff, 'Recognition for new Kosovo grows' *BBC News* 24 (London, 18 February 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7251359.stm#map>> accessed on 3 March 2017.

338 Rein Miillerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8 *Chinese Journal of International Law* 2, 7. He also argued that the use of force by NATO against Serbia in 1999 can only be seen as legitimate if it was for humanitarian purposes – this opposes any extension to remedial secession.

339 Srdjan Cvjic, 'Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo' (2007) 8 *German Law Journal* 57, 79.

340 William R. Slomanson, 'Legitimacy of the Kosovo, South Ossetia and Abkhazia secessions: Violations in search of a rule' (2009) 6 *Miskolc Journal of International Law* 1, 27.

341 Miillerson, (n 338) 4.

as motivated by its desire to exert power over Georgia,³⁴² despite little support from the global community.³⁴³

Secession is not allowed or recognised in cases of mere historical territorial grievances as it would be difficult to untangle it 'in any meaningful way by attempting to resolve such problems by redrawing borders to fit a particular critical date reflecting a particular historical grievance. The predominant contemporary response to this problem has been to expand the rights available to minorities, in the hope that by doing so their legitimate concerns can be met within the confines of existing states'.³⁴⁴ Therefore, the best way for an ethnically diverse, geographically sprawling state to protect itself against separatism in such cases is to protect the rights of minorities and far-flung communities.³⁴⁵ In absence of a minority-protection regime within states, the world could see an uncontrollable spawning of movements for new states, which could have dangerous consequences.

With the decline of colonialism, more space for alternative definitions of 'peoples' exist. Since the 1970s, in particular, there has been an expansion in the scope for internal self-determination and the protection of the rights of ethnic groups and minorities within the constitutional framework of a state. People like the Kurds (in Turkey, Iran and Iraq),³⁴⁶ Saami (of Norway, Sweden and Finland),³⁴⁷ Tamils (in Sri Lanka),³⁴⁸ the Basques and Catalonians (in Spain),³⁴⁹ and Hong Kong people (in China)³⁵⁰ are seeking to claim autonomy

342 Andrew Coleman, 'The Right to Self-Determination: Can it Lapse?' (2014) 5 *Journal of the Philosophy of International Law* 6, 16.

343 Milena Sterio, 'On the Right to External Self-Determination: "Selfistans," Secession, and the Great Powers' Rule' (2010) 19 *Minnesota Journal of International Law* 137, 168.

344 David Wippman, 'Secession, Territorial Claims, and the Indeterminacy of Self-Determination' (2000) 25 *Yale Journal of International Law* 287, 289.

345 Strobe Talbott, 'Self-Determination in an Interdependent World' (2000) 118 *Foreign Policy* 152, 160.

346 David Romano, *The Kurdish Nationalist Movement: Opportunity, Mobilization, and Identity* (CUP 2006).

347 Federico Lenzerini, 'The Right of a People to Enjoy its Culture: towards a Nordic-Saami Rights Convention' in F. Francioni and M. Scheinin (eds) (Martinus Nijhoff Publishers 2008).

348 Sumantra Bose, *States, Nations, Sovereignty: Sri Lanka, India and the Tamil Eelam Movement* (Sage Publication 1994).

349 Daniele Conversi, *The Basques, the Catalans, and Spain: Alternative Routes to Nationalist Mobilisation* (University of Nevada Press 1997).

350 Yun-Bor Wong, *Autonomy and Protection of Fundamental Rights in the Hong Kong Special Administrative Region* (Lexis Nexis 2007).

or expand their autonomy.³⁵¹ This has resulted in the recognition of many groups as ‘people’ on the basis of linguistic, ethnic, cultural, racial, and other characteristics.³⁵² Hence, in the contemporary era the concept of ‘people’ has broadened, qualifying many peoples—including indigenous peoples—for the right to internal self-determination. In 1989, at the request of UNESCO, Justice Michael Kirby supplied the definition of ‘people’ as:

A group of individual human beings who enjoy some or all of the following common features: a common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; or common economic life.³⁵³

UNESCO has added that ‘the group as a whole must have the will to be identified as a people or the consciousness of being a people’. In other words, the right to self-determination depends on a reflexive understanding of the notion of ‘people’. Therefore, the term ‘people’ in the phrase ‘the right to self-determination of peoples’ is a substantive and identity-centred concept.³⁵⁴ Within the concept of ‘self-determination’, the ‘self’ has both subjective and objective elements, which are necessary for members of the group concerned to think of themselves as a distinctive group, as well as for the group to have certain objectively determinable common characteristics, like ethnicity, language, history, or religion. Well-defined boundaries are rare.³⁵⁵ Ethnic and other minority delineations have a common similarity of reliance on both objective and subjective criteria. In other words, ethnic groups are not only to be identified as a ‘people’, but these acknowledged groups should also demonstrate the subjective element of awareness to preserve their distinct identity.³⁵⁶ The subjective nature of the concept of ‘people’ is, however, extraordinarily difficult to define and the afore-listed characteristics are not exhaustive.³⁵⁷ Nonetheless,

351 Koskenniemi, (n 18) 242.

352 Hurst Hannum, ‘Rethinking Self-Determination’ (1993) 34 *Virginia Journal of International Law* 1, 35.

353 UNESCO, *International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations*, UNESCO doc. SHS-89/CONF.602/7 at 7–8.

354 Kristin Henrard, *Devising an Adequate System of Minority Protection: Individual Human Rights, Minority Rights and the Right to Self-determination* (Martinus Nijhoff 2000) 291; Pestieau, (n 242) 368.

355 Hannum, (n 252) 31.

356 HRC, General Comment No. 23 (50), (art. 27), UNGAOR Hmn. Rts. Comm., para 62 (1994) UN Doc CCPR/C/21/Rev. I/ Add.5.

357 The International Commission of Jurists, ‘East Pakistan Staff Study’, (1972) 8 *International Commission Jurists Review* 23, 47.

the judicial decisions such as *Katangese Peoples' Congress v Zaire*,³⁵⁸ *re Reference re Secession of Quebec*,³⁵⁹ and *Republic of Tatarstan*,³⁶⁰ has affirmed that an ethnic group does constitute a 'people' for the purposes of right to self-determination. However, not all ethnic groups can qualify as units of self-determination if they exist as communities who do not share a sense of solidarity, common heritage, or destiny.³⁶¹

Furthermore, the protection of minority rights has acquired relevance at the regional level. However, the meaning of the term 'minority' is not same as the term 'people' for the purposes of determining the right to self-determination. The legal status and rights of minorities is still debated,³⁶² However, 'a person belonging to a minority' is recognised as belonging to a non-dominant group.³⁶³ Minority rights regimes are focussed on achieving equal protection and opportunities for minorities under the law, whereas a people seek self-governance against such assimilation.³⁶⁴ Under such circumstances, minorities lack the collective power necessary for claiming the right to external self-determination.³⁶⁵ However, minorities still possess the collective

358 *Katangese Peoples' Congress v Zaire*, African Commission on Human and Peoples' Rights, Communication No 75/92, IHRL 174 (October 1995) Merits – the question for the Commission to decide was whether the Katangese people could claim independence from Zaire by virtue of Article 20 of the African Charter on Human and Peoples' Rights. The Commission recognised Katangese people as distinct ethnic group but declared that the case holds no evidence of violations of any rights under the African Charter. The request for independence for Katanga therefore has no merit under the African Charter on Human and Peoples' Rights.

359 *Reference re Secession of Quebec* [1998] 2 SCR 217.

360 *Tatarstan Case*, Russian Constitutional Court, Ruling No. 3-P, VKS 1993, No.1, p.43 (March 13, 1992). In this case the Constitutional Court of Russian Federation agreed that the Republic of Tatarstan has the right to submit to vote the issue of its legal status as this right follows from the right of peoples to self-determination. See P. Maggs, G. Danilenko and W. Burnham, *Law and Legal System of the Russian Federation* (4th edn, Juris Publishing 2009) 184–89.

361 Buchheit, (n 234) 9.

362 Hannum, (n 352); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 27 states – '*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*'

363 Castellino and Gilbert, (n 18) 165.

364 Pestieau, (n 242) 364.

365 Henrard, (n 354) 218; The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities GA Res 47/135 (18 December 1992).

political awareness to participate in policy-decisions within a given territory or at national level.³⁶⁶ Europe, in particular, has an elaborate system for the protection of minorities. The European Convention on Human Rights contains a direct reference to minority rights.³⁶⁷ The Council of Europe also successfully adopted the two treaties that are directly relevant to minorities.³⁶⁸ A significant contribution to the field of minority rights protection has been made by the Organisation for Security and Cooperation in Europe,³⁶⁹ an intergovernmental organisation, and the Copenhagen Document 1990. The protection of languages is also prioritized in Europe.³⁷⁰ The collective effect of all minority rights instruments³⁷¹ is to place an emphasis on non-discrimination, political participation, and the promotion of minority languages, cultures, religions, and ethnic identities. European institutions have also strengthened the corpus of work on the right to internal self-determination under international law.

However, the minority rights protection systems are not considered to be elaborate enough in third world nations, as neither majorities nor minorities are generally well protected.³⁷² Even in some developed countries, such as Australia, there continue to be deep deficiencies in the minority protection regime.³⁷³

Kashmiris are inarguably a 'people' under international law, and can therefore pursue self-determination in that framework. India has classified Kashmiris as a distinct people by providing them autonomous status under Article 370 of its constitution, though it has not been able to end the political crisis in Kashmir, as we shall discuss in Chapter 5. It is interesting to note that

366 Henrard (n 354), 193; Castellino and Gilbert, (n 18) 164.

367 Council of Europe, European Convention on Human Rights (amended by Protocols Nos. 11 & 14 4 November 1950, entered into force 3 September 1953) ETS 5, arts 9, 14.

368 Council of Europe, The European Charter for Regional or Minority Languages (4 November 1992) ETS 148 and Council of Europe, the Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 February 1998) ETS 157.

369 Jane Wright, 'The OSCE and the Protection of Minority Rights' (1996) 18 HRQ 190; CSCE Helsinki Document (9–10 July 1992).

370 Robert Dunbar, 'Minority Language Rights in International Law' (2001) 50 International and Comparative Law Quarterly 90, 91.

371 *Declaration on the Rights of persons belonging to National or Ethnic, Religious or Linguistic Minorities*, UNGA Res 47/135 47 (1992) UN GAOR Supp No 49, 210.

372 Joshua Castellino and Elvira Domínguez Redondo, *Minority Rights in Asia: A Comparative Legal Analysis* (OUP 2006).

373 David Hodgkinson, 'Protection of Minority Rights in Australia: The Present Legal Regime' (1996–97) 19 Loyola of Los Angeles International and Comparative Law Journal 857, 858.

given the 1970 Declaration, there has been a stronger link between equal treatment (which minorities are entitled to) and the right to self-determination.³⁷⁴

In any case, as discussed in Chapter 1 the Kashmir question is not an issue that can be resolved through the provision of minority rights, but rather a matter concerning the Kashmiris' right to self-determination as a people.

*Aspects of Self-determination within Article 1 of ICCPR & ICESCR:
Inalienable Fundamental Human Rights*

Common Article 1 of ICCPR and ICESCR deals with the 'right to self-determination'. This right forms a basis for the exercise of civil and political rights and of economic, social, and cultural rights. The exercise of these rights contributes to the realisation of the right of peoples to self-determination.³⁷⁵ The HRC in the General Comment on Article 1 of ICCPR stated that:

The right to self-determination is of particular importance because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.³⁷⁶

Article 1 of both the Covenants envisages there to be a right to self-determination for all peoples, by virtue of which they can *freely* determine their political status and *freely* pursue their economic, social, and cultural development.

Common Article 1 of the ICCPR and ICESCR advocates the economic self-determination of peoples and affirms that the people of a sovereign state have the right to utilise their natural wealth and resources for their own needs.³⁷⁷

³⁷⁴ Castellino and Gilbert, (n 18) 166.

³⁷⁵ Aureliu Cristescu, *The Right to Self-Determination- Historical and Current Development in the Basis of United Nations Instruments* (United Nations Publications 1981) (E/CN.4/Sub.2/404/Rev.1) 31.

³⁷⁶ UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination of People) (13 March 1984), para 1.

³⁷⁷ Also Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 22 states: 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.' Also see, International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, C169 (Adopted 27 June 1989, entered into force 5 Sep 1991)

During the decolonisation period, there was a parallel movement to preserve the natural resources in occupied territories. For instance, Resolution 1803 (XVII) on 'Permanent sovereignty over natural resources' calls for the natural resources of a state to be used for national development and the well-being of the people of that state.³⁷⁸ As part of the human rights protection system,³⁷⁹ the government is therefore expected to exploit natural territorial resources for the profit of the people.³⁸⁰ Hence, in the post-colonial era, other international law treaties and declarations³⁸¹ also have called for the protection of specific natural resources such as water,³⁸² land/property,³⁸³ territorial sea,³⁸⁴ etc. Further, it is accepted that the occupying power is not allowed to destroy the natural resources of the occupied people.³⁸⁵ Article 53 of the Fourth Geneva

<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 13 December 2016.

378 *Permanent sovereignty over natural resources*, UNGA Res 1803 (XVII) (14 December 1962), 1194th Plen. Mtg, Sections 1, 7.

379 See, International Land Coalition 2009 Conference, Kathmandu Declaration: Securing Rights to Land for Peace and Food Security (23 April 2009) <<http://www.landcoalition.org/en/resources/kathmandu-declaration>> accessed 13 Dec 2016.

380 Declaration on the Establishment of a New Economic Order, UNGA Res 3201 (S-VI) (1974) 13 I.L.M. 715, para 4(2) (e) & The Charter of Economic Rights & Duties of States, UNGA Res. 3281 (XXIX) (1975) 14 I. L.M. 251.

381 United Nations Declaration on the Rights of Indigenous Peoples, UNGA Rep 1st Sess HRC, UN Doc. A/HRC/1/L.10 (2006), art 25, art 32 (1) & (2).

382 Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights) UN Doc. E/C.12/2002/11 (2002).

383 UN Conference on Human Settlements, The Vancouver Declaration on Human Settlements (Adopted 11 June 1976); Food and Agriculture Organization of the United Nations (FAO), General Principles: Land; Voluntary Guidelines (Adopted 127th Session of the FOA Council, November 2004), Guideline 8B (Access to resource and assets: Land); UNESCO Principles on Housing and Property Restitution for Refugees and Displaced Persons/Pinheiro Principles (Adopted 28 June 2005) E/CN.4/Sub.2/2005/17. See also Elisabeth Wickeri & Anil Kalhan, 'Land Rights Issues in International Human Rights Law' (2010) *Institute for Human Rights and Business* <https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf> accessed 13 December 2016.

384 United Nations Convention on the Law of the Sea, UNGA (Adopted on 10 December 1982, entered into force on 16 November 1994) Part II -Territorial Sea and Contiguous Zone – arts 2–16; UNGA, UN Declaration on the Rights of Indigenous Peoples (Adopted on 2 October 2007) UN Doc A/RES/61/295, URL: <<http://www.un.org/esa/socdev/unpfi/en/drip.html>>. Rio Earth Summit 1992, Convention on Biological Diversity, Nagoya Protocol, art 12.

385 UNGA Res 59/251 (22 December 2004) paras 6–7.

Convention, 1949, prohibited any destruction by the Occupying Power of 'real or personal property belonging individually or collectively to private persons, or to the State'.³⁸⁶ In keeping with this policy, the UN, on a number of occasions, called upon Israel as an occupying power to comply strictly with its obligations under international law and to stop dumping various kinds of waste materials in Palestinian Territories that could gravely threaten their natural resources.³⁸⁷ This also supports the view that 'title' obtained over a territory by occupation does not confer sovereignty over the natural resources. This discussion will be further developed in the context of Kashmir in Chapter 5.

Furthermore, Article 1 of these Covenants guarantees that 'all people' who have not exercised or have been deprived of the possibility of exercising their right to self-determination, are included.³⁸⁸ Therefore, the people of dependent territories have the right to decide their international status.³⁸⁹ Hence, Article 1 in the Covenants emerges as a *continuing right* and a *permanent*³⁹⁰ one. These Covenants, apart from referring to external self-determination, are also closely associated with internal self-determination. The other rights provided for in these Covenants cannot genuinely be exercised without the realisation of people's collective right to self-determination.³⁹¹ In their general formulation, these Covenants provide essential guidance about the meaning and content of the principle of self-determination.³⁹²

*Resolution 2625 (XXV): Exception to Principle of Territorial Integrity –
The Unrepresentative Government and Secession*

The right to self-determination is limited by the principle of territorial integrity.³⁹³ However, as mentioned, the most authoritative and comprehensive

386 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)* (Signed on 12 August, 1949) 6 UST. 3516, 75 UNTS. 287.

387 UNGA Res 59/251 (22 December 2004) para 6–7.

388 UN Human Rights Committee (HRC), CCPR General Comment No. 12: Article 1 (Right to Self-Determination of People) (13 March 1984) para 6.

389 Musgrave, (n 105) 150.

390 Comment made by the Chairman of the Working Party of the Third Committee when presenting the Draft to the Third Committee, UN Doc., A/C.3/SR. 668, para 3.

391 Cassese, (n 7) 145.

392 Castellino and Gilbert, (n 18) 155.

393 Khazar Shirmammadov, 'How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination: The Case of Crimea' (2016) 4(1) Russian Law Journal 61; Cassese (n 7); Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004).

change in the principle of right to self-determination was the adoption of Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, 1970 under Resolution 2625(XXV)³⁹⁴ (hereinafter the 1970 Declaration). Paragraph 7 (principle 5) of the 1970 Declaration has been understood to mean that a condition for the protection of territorial integrity is the existence of 'representative government' respectful of the human rights of its population.³⁹⁵ It suffices to mention here that although there is no legal 'right to secession' within international law,³⁹⁶ in the absence of representative government, secession seems to be circuitously allowed for the part of the population that is not represented by the government,³⁹⁷ e.g. the case of Bangladesh.³⁹⁸ The Canadian Supreme Court's decision concerning Quebec's right to secede from Canada reaffirmed the 1970 Declaration, stating that a right to secession may not be limited to formerly colonized peoples.³⁹⁹ However the court's decision refused Quebec's unilateral secession on the basis that the Canadian government did not oppress the Québécois.⁴⁰⁰ Likewise, the African Commission on Human and Peoples' Rights in the *Katangese Peoples' Congress v. Zaire*⁴⁰¹ used a similar argument to deny the Katangese people's right to independence from Zaire since there was no violation of human rights guaranteed to them by the African Charter on Human and Peoples' Rights. Clearly, within contemporary international law, the promotion of human dignity and human rights outweighs the principle of territorial integrity and, as such, could result in allowing

394 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970)' UNGAOR 25th Session Supp No. 28 UN Doc A/8028 (1970).

395 Pomerance, (n 285) 39.

396 Wippman, (n 344), 289.

397 Para 6, Martin Ennals Memorial Symposium on Self-Determination Saskatoon Statement on Self-Determination (Adopted on, 6 March 1993) in Donald Clark (ed), *Self-Determination- International Perspectives* (The Macmillan Press 1996) Appendix 1.

398 Harold H Saunders, 'What really happened in Bangladesh: Washington, Islamabad, and the Genocide in East Pakistan' (2014) 93 Foreign Affairs 36, 39; Information Service of the Indian Embassy in Washington DC, 'Text of Prime Minister's Statement in Parliament, 6 December 1971' (1972) 11 International Legal Materials 121.

399 *Reference re Secession of Quebec* [1998] 2 SCR 217 at 222.

400 Eastwood, (n 11) 347.

401 *Katangese Peoples' Congress v Zaire*, African Commission on Human and Peoples' Rights, Communication No 75/92, 1HRL 174 (October 1995) Merits.

secession.⁴⁰² Hence, 'if blind adherence to "territorial integrity", results only in deprivations of human rights in that territory, the regime is considered to have lost its *raison d'être*'⁴⁰³ and hence is not entitled to the protection of its territorial integrity. There is some degree of consensus among contemporary international scholars that secession may be allowed in cases where the people are oppressed by an unrepresentative government, or if their human rights are systematically violated. This is mainly because human rights violations can constitute a threat to peace.⁴⁰⁴ For example, it was due to the large-scale human rights violations that took place⁴⁰⁵ that the international community very quickly recognised Bangladesh as an independent state and admitted it as a member of UN in September 1974.⁴⁰⁶ Likewise, arguments for the recognition of Kosovo are also linked to the serious human rights violations involved, which also became a precursor for supporting Kosovo's remedial secession from Serbia.⁴⁰⁷ The humanitarian crisis involving a policy of ethnic cleansing of Kosovar Albanians⁴⁰⁸ prompted the 1999 intervention.⁴⁰⁹ Around 7–9,000 Kosovar Albanians were killed and over 800,000 were displaced.⁴¹⁰ In 2009,

402 Nartnirun Junngam, 'The Secessionist Movement in the Southernmost Provinces of Thailand: A View from the New Haven School of International Law' (2012) 20 Asia Pacific Law Review 233, 235; Nartnirun Junngam, 'The Trilogy of Secession, Self-Determination, and Recognition in Contemporary International Law (Part 1)' (2009) 38 Thammasat Law Journal 244, 244; Nartnirun Junngam, 'The Trilogy of Secession, Self-Determination, and Recognition in Contemporary International Law (Part 2)' (2009) 38 Thammasat Law Journal 394, 394.

403 Lung-Chu Chen, 'Self-Determination as a Human Right' in W Michael Reisman and Burns H Weston (eds), *Toward World Order and Human Dignity: Essays in Honor of Myres S McDougal* (Free Press 1976) 242.

404 W Michael Reisman and Eisuke Suzuki, 'Recognition and Social Change in International Law: A Prologue for Decision Making' in W Michael Reisman and Burns H Weston (eds), *Toward World Order and Human Dignity: Essays in Honor of Myres S McDougal* (Free Press 1976) 424.

405 The International Commission of Jurists, 'East Pakistan Staff Study' (1972) 8 ICJ Review 23, 26.

406 UNGA Res 3203 (XXIX) (17 September 1974).

407 Sterio, (n 343) 157.

408 Norman M Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth Century Europe* (Harvard University Press 2002) 150–51.

409 Sterio, (n 343) 156.

410 Marlise Simons, 'Tribunal focuses on Serbia's Kosovo war' (*International Herald Tribune*, 10 July 2006; reproduced in *the New York Times*, New York, 10 July 2006) <<http://www.nytimes.com/2006/07/10/world/europe/10iht-serbia.2166700.html>> accessed 25 June 2016.

the Serbian leadership was convicted for their crimes against Kosovo Albanians at the International Criminal Tribunal for the Former Yugoslavia.⁴¹¹ These discussions suggest that in cases where grave and organised human rights violations occur against the inhabitants of a territory, their claim to self-determination remains an option.⁴¹² In such cases, remedial secession is a moral claim of last resort.⁴¹³ Although remedial secession does allow manoeuvring beyond the minimalist position,⁴¹⁴ it does not give a free-for-all permission to all self-determination claims, and hence restricts the framework only to legitimate claims.⁴¹⁵ Indeed, Velasco distinguishes between the concepts of self-determination and secession, and argues that the former does not lead to secession, and that we need to understand self-determination as a human right if we are to address ethno-nationalist conflicts around the world.⁴¹⁶

Furthermore, self-determination can be exercised through independence, association, or integration with independent states, or the emergence into any other political status freely determined by a people.⁴¹⁷ Accordingly, the 1970 Declaration does not give any preference to a particular outcome of self-determination, but simply asserts that 'any political status freely determined by a people' constitutes an ideal mode of exercising the right to self-determination. Hence, within the 1970 Declaration, self-determination is a *continuous* right.⁴¹⁸

411 Prosecutor v. Milutinovic et al., International Criminal Tribunal for the former Yugoslavia (ICTY) (26 February 2009) Vol 2, IT-05-87-T. Albanians also committed crimes during the conflict and a tribunal is being established in the Hague to examine claims against the Kosovo Liberation Army. See Ministry of Foreign Affairs, 'Kosovo court to be established in the Hague' (Ministry of Foreign Affairs of the Government of the Netherlands, 15 January 2016) <<https://www.government.nl/ministries/ministry-of-foreign-affairs/news/2016/01/15/kosovo-court-to-be-established-in-the-hague>> accessed 30 June 2016.

412 Cvjic, (n 339) 74.

413 Simon, (n 223) 143–44, 146.

414 Sami M Dudar, 'Speaking of Secession: A Theory of Linguistic Secession' (2011–12) 40 Georgia Journal of International and Comparative Law 555, 560.

415 Coleman, (n 342) 23.

416 Zoila A. Velasco, 'Self-Determination and Secession: Human Rights-based Conflict Resolution' (2014) 16 International Community Law Review 75.

417 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970)' UNGAOR 25th Session Supp No. 28 UN Doc A/8028 (1970), Principle 5, Para 4.

418 Raic, (n 202) 228.

Territorial Separations and Secession: A Critical Discussion

So far, this discourse on the precepts of international law has examined the legal principles concerning the restoration of historical title, right to self-determination, illegal occupation, secession, and recognition, which can be used as means of addressing people's claims for freedom. However, in modern times, territories can also separate by agreement. In this context, Alfredsson notes that if two countries agree to separate through agreement and to carry out their right to self-determination in a manner that does not cause internal or external instability, then other countries will be very unlikely to object.⁴¹⁹ An example of such a peaceful separation is that of Czechoslovakia into the Czech and Slovak Republics. The international community recognised the birth of new states in the former Soviet Union and Yugoslavia through self-dissolution of the federation, which took place largely outside international law except in case of Baltic States.⁴²⁰

The fracturing of Yugoslavia along ethnic lines, which many described as secession,⁴²¹ was instead seen by the Arbitration Commission of the Conference on Yugoslavia (Badinter Arbitration Committee) created by the European Economic Community to deal with the breakup of Yugoslavia as dissolution.⁴²² In its Opinion No. 3 (Borders), the Badinter Commission based its ruling on the principle of *uti possidetis* and stated that the internal borders of the newly created states of Croatia, Bosnia, and Herzegovina became international borders after dissolution of the former Yugoslavia.

419 Alfredsson, (n 223) 60; Brietzke, (n 18) 87.

420 Cassese, (n 7) 273.

421 Sikander Shah, 'An In-depth Analysis of the Evolution of Self-Determination under International Law and the Ensuing impact on the Kashmiri Freedom Struggle, Past and Present' (2007) 34 Northern Kentucky University Law Review 29, 39.

422 Anthony Carty, 'The System of International Law: The Right to Self-Determination, Minority Rights and Patterns of Human Rights Violations-Connections with the Break-up or Implosion of States' (2001-02) 1 European Yearbook of Minority Issues 65, 69. Carty argues that the death of Yugoslavia is not treated as secession even though the federal units split off from the Yugoslav central government in Belgrade one by one. They did not all break away simultaneously from a centre, which thereby suddenly cease to exist; Cassese, (n 7) 272; Alain Pellet, 'The Opinions of the Badinter Arbitration Committee' (1992) 3(1) European Journal of International Law 178. The Badinter Arbitration Committee in its Opinion No. 1 (Dissolution of SFRY) asserted that the breakup of Yugoslavia constituted dissolution and not secession. Pellet reviewed the question of frontiers and self-determination through the opinions of the Badinter Commission and focused on decolonisation and its relationship with the stability of frontiers. He concludes that it is for this reason that the Badinter Commission characterized the Balkan crisis as 'dissolution' rather than 'secession.'

Some scholars question the application of *uti possidetis* to the creation of new states in the post-colonial era, such as the creation of new states from the former Yugoslavia.⁴²³ They argue that *uti possidetis* only applies in the context of decolonisation and that its rigid application could potentially pave the way for increased conflicts rather than stability.⁴²⁴ However, it is argued that in situations of illegal annexation (such as in the Baltic States after they successfully restored the historical title of their territory) the acceptance of the internal borders of the newly created states on the basis of *uti possidetis* could represent a practical solution.⁴²⁵ For instance Ziemele, while discussing the maritime boundaries in the Baltic Sea, stated that there was no particular reason for the non-applicability of the principle of *uti possidetis* to the non-disputed borders of the Baltic States, particularly since such borders did not change after the disintegration of the Soviet Union.⁴²⁶ However, other scholars believe that border agreements between Russia and the three Baltic states were primarily the result of political considerations and diplomatic negotiations and not the application of *uti possidetis*.⁴²⁷

In Yugoslavia, grave human rights violations like genocide and crimes against humanity were routinely committed against minorities, who had no real say in government.⁴²⁸ Some of the nations in the Socialist Federal Republic of Yugoslavia, like Slovenia and Croatia, declared their independence on 25 June 1991.⁴²⁹ Montenegro and Kosovo seceded from Serbia in 2006 and 2008, respectively. In the case of Bosnia-Herzegovina, the Arbitral Committee took a

423 See generally, Peter Radan, *The Break-Up of Yugoslavia and International Law* (Routledge 2002); Peter Radan, 'Post-Secession International Borders: Critical Analysis of the Opinions of the Badinter Arbitration Commission' (2000) 24 Melbourne University Law Review, 50; Peter Radan, 'The Borders of a Future Independent Quebec: Does the Principle of *Uti Possidetis Juris* Apply?' (1997) 15 Australian International Law Journal 200.

424 Michla Pomerance, 'The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence' (1998) 20 Michigan Journal of International Law 31.

425 See generally Lone, (n 261).

426 Ineta Ziemele, *State Continuity and Nationality: The Baltic States and Russia* (Martinus Nijhoff 2005).

427 See L Weerts, 'Heurs et malheurs du principe de l'*uti possidetis*: le cas du de' membrement de l'URSS' in O Corten, B Delcourt, P Klein et al (eds), *De'membresments d'E' tats et de' limitations territoriales: l'*uti possidetis* en question(s)* (Bruxelles: Bruylant 1999) 97.

428 John Hagan, Ron Levi and Gabrielle Ferrales, 'Swaying the Hand of Justice: The Internal and External Dynamics of Regime Change at the International Criminal Tribunal for the Former Yugoslavia' (2006) 31 Law & Social Inquiry 585.

429 Iglar, (n 334) 213.

different view and found that no valid referendum for independence had been held there. Instead, the Committee stated that a plebiscite had taken place on 10 November 1991 by the 'Serbian people of Bosnia-Herzegovina', who opted for the common Yugoslav State.⁴³⁰ Hence, the will of the Bosnians was not taken into account. Therefore, the non-participation of Bosnians became a legitimate cause for secession for them. Generally, the independence of these new states can be attributed in part to the international community's willingness to extend recognition to them.⁴³¹ Secession or dissolution is different from the separation of a territory from the state. In the latter case, wrongful occupation and incorporation is involved. Therefore, the secessionist claims of Kosovo, Bosnia-Herzegovina, Abkhazia⁴³² (Georgia), Chechnya⁴³³ (Russia), Transnistria⁴³⁴ (Moldova), Tibet/Xinjiang (China)⁴³⁵ and Biafra (Nigeria) are different from separation based on illegal occupation where the acquisition of the territory was carried out in violation of applicable international law. In such cases, the division of the territory at a later date may fall under the heading of the restoration of historical title as opposed to secession.⁴³⁶ In cases of secession, people do not have historical claims or ties to the territory that they are claiming. In fact, the separation of a part of a *de facto* and *de jure* territory of a parent state is carried out by the resident population with the aim of creating a new

430 Cassese, (n 7) 272.

431 Eastwood, (n 11) 313.

432 Simon, (n 223) 141.

433 WC Papadopoulos, 'International Law & Pipeline Geopolitics in the Caspian Sea' (1999) 36 *Texas Journal of Business Law* 1, 18.

434 Tarik Abdel-Monem, 'How Far Do The Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights' (2005) 14 *Journal of Transnational Law and Policy* 159, 183.

435 See generally, Colin Mackerras, *China's Ethnic Minorities and Globalization* (Routledge 2003); LC Harris, 'Xinjiang, Central Asia and the Implications for China's Policy in the Islamic World' (1993) 133 *The China Quarterly* 111; Emily Hannum and Yu Xie, 'Ethnic Stratification in Northwest China: Occupational Differences between Han Chinese and National Minorities in Xinjiang 1982–1990' (1998) 35 *Demography* 323; Gardner Bovingdon, *Autonomy in Xinjiang: Han Nationalist Imperatives and Uighur Discontent* (East-west Centre Washington 2004) 14–15; B.G. Phan, 'How Autonomous are the National Autonomous Area of the PRC? An Analysis of Documents and Cases' (1996) 32 *Issues & Studies* 83; Sautman, (n 166); Xu Mingxu, 'Complete Autonomy: the Best Approach to Peaceful Resolution of the Tibet Problem' (1998) 7 *Journal of Contemporary China* 369, 370; Paul Harris, 'Tibet's Legal Right To Autonomy' (2008) 171(4) *Far Eastern Economic Review* 17.

436 Christine Haverland, 'Secession' (1987) 10 *Encyclopedia of Public International Law* 384.

independent state.⁴³⁷ The seceding people may trigger remedial secession, as the exercise of right to external self-determination is based on strictly defined circumstances, and 'only if' human rights are grossly and systematically violated. They may also trigger remedial secession if they have an unrepresentative government that persistently refuses them participatory rights⁴³⁸ e.g. in Bangladesh⁴³⁹ and Kosovo.⁴⁴⁰ In such circumstances, there is no likelihood for reaching any peaceful solution.⁴⁴¹

In annexed territories like the Baltic States and Kashmir, the implanted governments were installed mainly to crush potential claims to restoring historic title. In this category, abandoned European colonies such as Western Sahara and Kashmir are included, as they acquired/regained title soon after they were deserted and before they were annexed by a neighbouring state. In such situations, the annexing state does not have any title to the territory annexed.⁴⁴² The basic claim to external self-determination is generated by the title to the territory. This aspect of the Kashmir question will be explored in some detail in Chapters 4 and 5.

A secessionist movement directly undermines the constitutional arrangements of the state they are seceding from. Therefore, the purported grounds for secession should be viewed and if possible dealt with domestically, e.g. Quebec. However, in the separation cases where occupation is involved, as in the Western Sahara or the Baltic States, the question of separation is not a domestic issue. Hence it can be dealt with internationally.

The 1970 Declaration is applicable to annexed and occupied territories. Hence, systematic human rights violations by unrepresentative governments become an additional factor for demanding the right to self-determination. In such circumstances, the principle of territorial integrity cannot shield States

437 KW Watson, 'When in the Course of Human Events: Kosovo's Independence and the Law of Secession' (2008) 17 *Tulane Journal of International and Comparative Law* 274.

438 Cassese, (n 7) 119.

439 Harold H Saunders, 'What really happened in Bangladesh: Washington, Islamabad, and the Genocide in East Pakistan' (2014) 93 *Foreign Affairs* 36, 39; Information Service of the Indian Embassy in Washington DC, 'Text of Prime Minister's Statement in Parliament, 6 December 1971' (1972) 11 *I.L.M.* 121.

440 Simon, (n 223) 143.

441 Cassese, (n 7) 120; Thomas W. Título Williams, 'Defining "Aggression" in Light of the India-Pakistan Conflict of 1971' (1973–74) 18 *St. Louis University Law Journal* 129, 141.

442 Van Elsuwege, (n 9) 378; Dagmara Vallens, 'The Law on Aliens Controversy in the Baltic States' (1995) 54 *International Commission of Jurists Review* 1, 6.

from international human rights obligations,⁴⁴³ including allowing people to exercise their democratic rights and participate in fair elections. The people of annexed territories are usually coerced into participating in unfair elections organized by unrepresentative governments, and therefore they should have a 'right not to vote'. This is because the 'people cannot be compelled⁴⁴⁴ to vote' if there is a strong reason to believe that the existing government will not provide them true representation.

Part 3: Restoration of Historical Title and Self-determination – The Complementary Principles for Claiming Independence

Having discussed the restoration of historical title, self-determination, and the significance of the right to self-determination to state continuity, it is obvious that a people are entitled to express their 'political will' through independence.⁴⁴⁵ In the post-colonial period, the self-reliant concepts of the restoration of historical title and right to self-determination have developed a very unique association which has transformed a historical debate into a democratic one.⁴⁴⁶ The exercise of the right to self-determination leads to the realization of the claim of the restoration of historical title. In the modern era, self-determination and the concept of democracy have attained significance. However, the restoration of historical title is equally important. As discussed, the new discourse on the historical title offered by the PCA (2016) decision on the South China Sea dispute (Philippines-China UNCLOS Arbitration)⁴⁴⁷ as well as by the Position Paper issued by China (2014)⁴⁴⁸ suggests that it cannot

443 David Raic, 'The Code, Humanitarian Law and Human Rights' in G C de Nooy (ed) *Cooperative Security, the OSCE and its Code of Conduct* (Kluwer Law International 1996) 41.

444 Heather Lardy, 'Is There a Right Not To Vote?' (2004) 24(2) OJLS 303, 320.

445 14 Series 3 Basket 111 Hearings before the US on Security and Cooperation in Europe and Other Congressional Hearings Reports and Prints 1 1987, 'Implementation of the Helsinki Accords: Baltic Dissidents' October 6 1987 session (US Government Printing Office, Washington 1988) 3; Partlett, (n 25).

446 Castellino and Gilbert, (n 18) 164.

447 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (12 July 2016) PCA Case No 2012-19, 312, para 798.

448 China refused to participate in this arbitration but the Ministry of Foreign Affairs of the People's Republic of China issued a Position Paper. Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines (*Ministry of Foreign Affairs of the People's*

be entirely ignored.⁴⁴⁹ This new legal philosophy accepts that the continuous exercise of authority over the land and its recognition by other states⁴⁵⁰ is significant in determining historical title, which is a hallmark of sovereignty to land.⁴⁵¹ The history of entities such as Kashmir, whose title remains unresolved, provide additional perspectives concerning the legal arguments on title. In fact, it is only a historical title to territory that entitles people to the right to self-determination.⁴⁵² Where such a claim exists, it would not matter whether the group in question is homogeneous along linguistic, cultural, religious or ethnic lines.⁴⁵³ Nonetheless, where people (apart from having a historical claim) also have a common ethnic identity such as *Kashmiriyat* in the case of Kashmiris, it would make their historical claim to their territory stronger. As discussed, people could also claim external self-determination on the basis of human rights violations⁴⁵⁴ and the denial of any meaningful participatory rights within the state⁴⁵⁵ by its unrepresentative government, as in the cases of Bosnia-Herzegovina and Bangladesh. These additional factors could exist in cases involving the restoration of historical title, making their claims more authoritative and achievable. This, for example, was seen above in the US treatment of the Baltic States.⁴⁵⁶

Furthermore, in substantiating the claim for restoration of historical title as explained earlier, the final act of exercising self-determination is significant to remedy the illegal occupation.⁴⁵⁷ Therefore, it is not rational to discount the right to self-determination when dealing with the restoration of historical title. This is because without the exercise of self-determination, the restoration of historical title would not be operative, as demonstrated by the Baltic

Republic of China, 7 December 2014) <http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml> accessed 10 January 2017.

449 *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China)* (12 July 2016) PCA Case No 2012-19, para 247; 117, para 278.

450 *ibid* para 221; 113, para 265.

451 *ibid* 96, para 225.

452 Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177, 201.

453 Brilmayer (n 27), 69.

454 Kazi, (n 181) 19–20.

455 *Reference re Secession of Quebec* [1998] 2 SCR 217 at 222.

456 14 Series 3 Basket III Hearings before the U.S. on Security and Cooperation in Europe and Other Congressional Hearings Reports and Prints 1 1987, 'Implementation of the Helsinki Accords: Baltic Dissidents' October 6 1987 session (US Government Printing Office, Washington 1988) 3.

457 Cassese, (n 7) 95; Van Elsuwege, (n 9) 381.

States' situation.⁴⁵⁸ That said, within international law the relationship between the territorial claims to NSGTs based on historical title and the right to self-determination remain ill-defined.⁴⁵⁹ Hence in specific cases, and under carefully defined circumstances, the restoration of historical title cases could be strengthened by taking into consideration state practice and international recognition.⁴⁶⁰ For instance in the case of the Baltic States, it is important to recall that most Western democracies never recognized the Soviet annexation of those states as being legal.⁴⁶¹

Further, it is necessary to adopt an interdisciplinary approach to analysing state practice in order to investigate the intention of the officials involved. Clearly, in the absence of such information, 'it is impossible to understand the meaning of the behaviour if one does not have access to the intentions of an actor'⁴⁶² and affirm that 'it is a matter of evidence, and the evidence is in the archives at the Public Records Office'.⁴⁶³ Therefore, access to the 'psychological element' or *opinio juris* is useful to ascertain the intention behind consent or beliefs. This approach will be adopted in Chapters 4 and 6 to enquire into the intentions of Britain and the international community when dealing with the statehood and right to self-determination of the Princely State of Jammu & Kashmir. It will help to trace the international community's 'internal conduct', which is not always ascertained from its broad 'external conduct'.⁴⁶⁴ As discussed in detail in Chapter 6, the unilateral acts and declarations of state officials could amount to *opinio juris*, making them legally binding verbal undertakings and, as such, states could be estopped from changing their conduct in a way that is inconsistent with their declarations.⁴⁶⁵

The relationship between the restoration of historical title (which is connected to the use of illegal force) and self-determination is not oppositional, but is rather one of harmony in cases where the people have a valid title to the

458 Graham Smith, *The Baltic States: the national self-determination of Estonia, Latvia, and Lithuania* (St. Martin's Press 1994); Van Elswege, (n 9) 388.

459 Musgrave, (n 105) 254.

460 Ziemele (n 426); Grazin, (n 1) 1385; Butler, (n 217) 303.

461 Vallens, (n 442) 6.

462 Anthony Carty and Richard Smith (eds), *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office, 1932–1945* (Kluwer Law International 2000) 2.

463 *ibid* 21.

464 See Clark, (n 148) 86, where he examines the inconsistencies between Australia's internal and external conduct.

465 *Nuclear Tests (Australia v France)* (1974) ICJ Rep 253, 267, para 43; *Nuclear Tests (New Zealand v France)* (1974) ICJ Rep 457, 472, para 46; *Legal Status of Eastern Greenland (Denmark. v Norway.)* (5 April 1933) PCIJ (series A/B) No. 53, 6.

territory. As witnessed in Baltic Republics, self-determination movements can bring claims for the restoration of historical title to the fore. In other words, the exercise of self-determination strengthens the restoration of historical title argument.

Sometimes attempts to evade the need to restore historical title may lead to human rights violations perpetrated by an unrepresentative government, as in Kashmir.⁴⁶⁶ I suggest that the two principles of the restoration of historical title and self-determination are complementary, and can be used simultaneously in cases where the restoration of historical title generates a self-determination claim. However, it is the exercise of self-determination that sets the process of restoring historical title into operation. The restoration of historical title re-establishes the sovereignty of the state, which in turn facilitates the protection of human rights by reducing the likelihood of war and promoting the right to self-determination.⁴⁶⁷ A state that is occupied by illegal means becomes more vulnerable to external attacks and violations of human rights.⁴⁶⁸ Therefore, one can argue that the restoration of statehood is an essential ingredient for the peaceful protection and exercise of external self-determination.⁴⁶⁹

The occupation and annexation of parts of a territory does not create a new people; it is still the people of that territory as a whole who should determine their future.⁴⁷⁰ It has long been acknowledged that even occupation for the sake of liberation, such as during the USA's occupation of Germany in World War II, must be ethical and only for a limited time and purpose.⁴⁷¹ People who are under alien domination or foreign occupation should be able to realise their inalienable right of self-determination in a meaningful way. Resolution 3314 (XXIX) further supports this principle.⁴⁷² This Resolution confirms that the definition of aggression would not in any way prejudice the right of people under alien domination to struggle and to seek and receive support,

466 Asia Watch, *The Human Rights Crisis in Kashmir: a Pattern of Impunity* (Human Rights Watch, 1993).

467 Carty, (n 422).

468 Alfredsson, (n 233) 61.

469 Vladyslav Lanovoy, 'Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right?' (2015) 4 *Cambridge Journal of International and Comparative Law* 388.

470 Alfredsson, (n 233) 61.

471 Charles Fairman, 'Some Observations on Military Occupation' (1947–48) 32 *Minnesota Law Review* 319, 321.

472 Definition of Aggression, UNGA Res. 3314 (XXIX) (14 December 1974).

in accordance with the principles of the Charter.⁴⁷³ Scheuner takes it a step further by arguing that in order not to become mere fiction, a 'will to the mental continuity' must be confirmed by the acts of the population (resistance acts, fighting).⁴⁷⁴ Mälksoo notes that the state is kept alive by the 'living mental-political unity of the people in the sense of a national consciousness',⁴⁷⁵ which is a crucial element of a state. In this context, the self-determination of peoples and the restoration of the state continuity are deeply related concepts, though their exact interplay depends on the circumstances of each case.

Concluding Remarks

The present chapter has attempted to demonstrate that the restoration of historical title and the right to self-determination are self-reliant principles. However, restoring historical title in practice requires exercising self-determination. As discussed generally, the principle of state continuity/restoration of historical title applies to situations where the territorial integrity of the state has been disrupted by war, colonisation, or belligerent occupation. It was argued that the international community's general position on illegal annexation/occupation is based on the principles of *ex injuria ius non oritur* and *ex factis oritur ius*.⁴⁷⁶ Most states that lose their sovereignty due to illegal occupation can base their claim to restoration and state continuity on the principle of *ex injuria ius non oritur* and claim external self-determination, which is mainly in the form of independence. Hence, the UN no longer recognises sovereignty as being exclusively a matter of control, and has consistently maintained that the acquisition of territory by force violates general notions of international law.⁴⁷⁷

It was argued that among all the elements of a state it is the population, i.e. the 'people's will', that gives life to the concept of the restoration of historical

473 *ibid* art 7.

474 Quoted in Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law*, (n 11) 34.

475 Quoted in *ibid*, 34.

476 Statute of the International Court of Justice, UNCIO (XV) 355 (26 June 1945). Arts. 38(1) (b) & (c).

477 Michael Shane French-Merrill, 'The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached Its International Obligations in Ratifying the Timor Gap Treaty' (2000) 8 *Cardozo Journal of International and Comparative Law* 285, 317.

title and keeps a nation alive through state continuity. It was also discussed that it is possible to preserve the identity of a state or prevent extinction by a process of continuity even if *de facto* control was lost through illegal annexation.⁴⁷⁸ The principle of *postliminium* explains such survival by accepting that the state's death after its occupation is reversed as soon as the occupation of annexed state ends. Furthermore, an 'extinct' state cannot be seen to have *de jure* continuity without referring to its subjective existence. As such, it is significant to take into consideration both the objective and subjective existence of a state when determining the statehood of annexed states. It was discussed that in cases of historical territorial disputes, inter-temporal law is highly relevant to determining the status of the territory in question. The evaluation of the right to self-determination made it clear that this principle has limited scope in the post-colonial era and its acceptance is often hampered by problems of definition, implementation, limitation, and enforcement.⁴⁷⁹ Despite this, State practice suggests that self-determination claims have been successful and that the UN resolutions over the years have recognised external self-determination as a right belonging not only to colonial peoples but also to people subjected to other forms of foreign/alien occupation. The body of law on decolonisation accepts that the right to external self-determination is an available option to people living in colonies or NSGTs and to people subjected to 'alien subjugation, domination and exploitation'. The SC recognises the inalienable right to self-determination of the abandoned colonies, and hence accepts that 'alien subjugation' is applicable to non-European States occupied by neighbouring territories, e.g. East Timor. Indeed, the legal problems connected with the status of the Baltic States results from their legal status as the victims of aggression and the subjects of alien occupation.⁴⁸⁰ The case law jurisprudence from domestic courts (*Reference re Secession of Quebec*⁴⁸¹) as well as international courts (*Kosovo Opinion*,⁴⁸²) suggest that freedom from oppression and alien subjugation is the main determinant of the legitimacy of self-determination claims.⁴⁸³ Ignoring such legitimate claims (as in the case of Palestine⁴⁸⁴

478 Van Elsuwege (n 9), 381; see generally, James Crawford, The Rights of Peoples: Some Conclusions, in James Crawford (ed) *The Rights of People* (Clarendon Press 1998) 159, 169.

479 Collins, (n 232).

480 Grazin, (n 1) 1418.

481 *Reference re Secession of Quebec* [1998] 2 SCR 217.

482 *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, (Advisory Opinion), [2010] ICJ Rep 403.

483 Andrew K Coleman, *Resolving Claims to Self-Determination: Is there a role for the International Court of Justice?* (Routledge 2013) 82–83.

484 Paul Eden, 'Palestinian Statehood: Trapped between Rhetoric and Realpolitik' (2013) 62 *International and Comparative Law Quarterly* 225, 227.

and Kashmir) threatens long-term world peace and stability.⁴⁸⁵ State practice on self-determination has also shown an agreement to limit the concept of 'foreign occupation' to intervention by use of force and military occupation.⁴⁸⁶

It could then reasonably be concluded that, in the context of an external right to self-determination, 'alien domination and subjugation' applies when one state 'dominates' the people of a 'foreign territory' by the use of force. External self-determination can therefore be claimed if belligerent occupation or illegal annexation of formerly colonized territories or self-identifying groups (based on their distinct history, language, religion, and culture) is involved.⁴⁸⁷

This broader interpretation of the right to self-determination has been widely accepted by the international community as applying to situations like Palestine, East-Timor, Kuwait, Grenada, the Baltic States, and Namibia.⁴⁸⁸ That said, it is clear that the right to external self-determination can arise only in the most extreme of cases and under very carefully defined circumstances.⁴⁸⁹ It is also clear that the Friendly Relations Declaration stipulated that alien subjugation may exist outside salt-water colonialism and gave people an option to secede in situations where there is systematic non-representation in national government, widespread violations of human rights, and a lack of effective remedy under either domestic or international law.⁴⁹⁰ These factors continue to be the requirements for a valid claim for remedial secession and require at minimum the following: (1) a people (2) that these people have been subjected to historical and persistent State-sponsored human rights abuses (3) that they have no viable alternative recourse within domestic legal channels.⁴⁹¹ This chapter has demonstrated that for people (including those in the abandoned colonies such as East-Timor or Kashmir) who have historical title over the territory they are claiming, the presence of human rights violations

485 Jennifer A Orange, *Resolving Claims to Self-determination* (2014) 10 *Journal of International Law and International Relations* 1, 2.

486 UNGA Res. 38/16 (22 November 1983).

487 Daniel Fierstein, 'Kosovo's Declaration Of Independence: An Incident Analysis Of Legality, Policy And Future Implications' (2008) 26 *Boston University International Law Journal* 417, 436–37; See generally, James Crawford, *The Rights of Peoples: Some Conclusions*, in James Crawford (ed) *The Rights of People* (Clarendon Press 1998) 159, 169.

488 Cassese, (n 7) 94.

489 Reference re Secession of Quebec [1998] 2 SCR 217 at 282.

490 Christopher J Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition', (2008) 12(2) *American Society of International Law* <<https://www.asil.org/insights/volume/12/issue/2/kosovos-declaration-independence-self-determination-secession-and>> accessed 12 March 2017.

491 Fierstein, (n 487) 442.

and unrepresentative government provide additional grounds for their claim to external self-determination based on their ethnicity, which is separate and distinct. Hence, the separation of Kashmir is not 'secession' but restoration.

In cases where historical title has been restored, people's claims have been based on their territorial ties. Such a claim is strengthened if the people are ethnically distinct because, as will be discussed in Chapter 4, the territory they claim forms a part of their identity. Territorial integrity provides them a secure future wherein they can freely exercise their right to self-determination. Territorial claims generate greater support and legitimacy to calls for self-determination. Therefore, if territorial integrity is properly understood, it accommodates the principle of self-determination.⁴⁹²

492 Brilmayer, (n 452) 202.

PART 2

Application of the International Law Normative Framework on the Kashmir Question



The Legal Validity of the Illegal Seizure of Kashmir: An Archival and Legal Review

Introduction

The present chapter seeks to review the validity of the 1947 Instrument of Accession (IOA) that ceded the state of Kashmir to India. This review will be based on archival materials with a particular emphasis on the Foreign Office Legal Advisors' legal opinion. Within the broader international context, the British dimension on the IOA provides a crucial view on the statehood of Kashmir in 1947. This chapter discusses the validity of the IOA, which India alleges is the basis of its seizure of Kashmir. The IOA cannot be effectively reviewed in terms of the Vienna Convention on the Law of Treaties 1969 as it is akin to an unequal treaty, and was part of the imperialistic seizure of Kashmir by the British Indian successor state of India. In addition, the Vienna Convention did not exist in 1947, therefore rendering a review of the IOA with regards to it is unhelpful. Rather the IOA needs to be discussed with regards to the contemporaneous law of that period. The most accurate approach to review the legal validity of the IOA and the Indian seizure of Kashmir in 1947 is from the perspective of Foreign Office documents and British policies.

The aim of this critique is essentially to review several significant questions: Was Kashmir an independent state prior to 1947? Is it, in contemporary times, in a position to claim the restoration of its historical title? Also, in keeping with British state practice on political self-determination in its former colonies, can Kashmiris claim entitlement to decolonisation in the classical sense? Can the exercise of self-determination by the people of Kashmir enliven their territorial claim? It is proposed that these issues should be discussed with reference to the aforementioned significant archival materials that determined the statehood of Kashmir and the official imposition of a British Protectorate over the Princely State of Kashmir. This will be followed by a review of documents demonstrating Kashmir's unlawful seizure by India.

The first batch of documents will review the statehood of Kashmir by considering its historical title up to 1947 and its relations with British India during this time. The archival documents related to the first batch include

communications between British India and the Princely State of Kashmir indicating its Protectorate status. Taking an interdisciplinary approach¹, this discourse will also examine the British *opinio juris* in light of archival documents. This will involve the examination of the conduct of Britain, its official legislation, and official declarations. The archival communications are significant in filling in the gaps that appear in the secondary materials related to the disposition of Kashmir during the decolonisation of British India. Unfortunately, most scholars who have written on Kashmir have not analysed whether the Princely State of Kashmir could be viewed as an independent state in 1947, both before and after its illegal seizure.² The issue will be discussed in this chapter.

The archival documents that review the validity of Kashmir's accession to India are then examined with a focus on the legal opinion of Foreign Office Legal Adviser, Sir Gerald Fitzmaurice, alongside mainstream international law. The archival documents provide sufficient supporting evidence for challenging the official irregularities that were committed at the time of the Viceroyalty of Mountbatten, which became a precursor for the illegal seizure of the Princely State of Kashmir by India. The legality of the IOA as the basis of India's seizure of Kashmir will also be discussed. These documents suggest that even before the Indian Independence Act 1947 (IIA) came into force, Congress leadership presumed that Kashmir was a part of India. There was already preparation in place to seize the territory of Kashmir by coercion and deception, and indeed the tribal incursion only triggered the Indian invasion. Morris-Jones, Constitutional Advisor to Mountbatten from June–August 1947, notes that when the time for announcing Mountbatten's 3 June plan (1947) came closer, London had accepted that 'some [states] may confirm their wish to ... stand out independently, whether singly or jointly'.³

1 Anthony Carty and Richard A Smith, *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office, 1932–1945* (Martinus Nijhoff Publishers 2000) 2.

2 Navnita Chadha Behera, *Demystifying Kashmir* (Brookings Institution Press 2006); Ajit Bhat-tacharjea, *Kashmir: The Wounded Valley* (UBS Publishers 1994); Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Harvard University Press 2005).

3 WH Morris-Jones, 'The Transfer of Power 1947: A View from the Sidelines' (1982) 16 *Modern Asian Studies* 1, 12–13.

The Question of Competence: The International Status of Kashmir until 1947

Statehood of the Princely State of Kashmir – The View from the Archives

Before the partition of British India, the Princely State of Kashmir was an autonomous state under the paramountcy of British rule.⁴ Constitutionally, the Princely States were not part of British India, nor were their inhabitants British subjects. Parliament had no power to legislate for the states or their subjects.⁵ The British authorities had legal jurisdiction only in matters of defence and foreign affairs. It was only during the period of gross misgovernment that the British intervened in Kashmir.⁶ This has been discussed in Chapter 2. The British intervened in the internal affairs of Kashmir during Maharaja Pratab Singh's reign, resulting in the dispossession of his powers to govern Kashmir from 1889 to 1905 due to his misrule.⁷ Unlike other Indian Native states, Kashmir did not have a British Resident imposed on it until as late as 1885, and the change was mostly due to strategic reasons and the threat from Czarist Russia and Afghanistan.⁸ Generally, Kashmir enjoyed a higher level of autonomy and several political advantages⁹ as a result of being a buffer State.

Kashmir had consolidated power (reflected in its constitution Jammu and Kashmir Constitution Act 1939)¹⁰ general laws,¹¹ and the numerous treaties that Kashmir signed with the British and the neighbouring states.¹² Kashmir had its own rules for citizenship, which were framed into law by the State Subject Definition Notification of 20 April 1927.¹³ This law gave people preference

4 The Treaty of Amritsar, 16 March 1846.

5 Gururaj Rao, *Legal Aspects of the Kashmir Problem* (Asia Publishing House 1967) 13.

6 IOR/L/PS/20/F197: Memorandum of the Indian State People [BL].

7 Letter from the Government of India to the Secretary of State for India, 3 April 1889, reproduced in William Digby, *Condemned Unheard – The Government of India and H.H. the Maharaja of Kashmir* (Indian Political Agency 1890) 155–56.

8 Letter from the Government of India to the Secretary of State for India, 7 April 1884, Foreign Department (Secret E)/Pros May 1884/Nos. 354–7 [NAI].

9 Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights and the History of Kashmir* (Hurst & Company 2004) 11.

10 Act XIV of Samvat 1996 (AD 1939).

11 See, Chapter 2.

12 Treaty of Amritsar 1846 (with British), the Agreement with Tibet 1852, Treaty with Kashmir 1870 (with Britain) and the Gilgit Lease 1935 (with Britain).

13 State Subject Definition Notification No I-L/84 of 20 April 1927.

in matters of employment and government services. Under this Order it was important for the Class III State subjects (who were mostly foreign nationals) to acquire *rayatnama*¹⁴ before purchasing immovable property, which they could get after continuously living in the state for ten years or with the permission of an *ijazatnama*.¹⁵ It was followed by notification No.13L/1989 of 27 June 1932, which determined the status of foreign nationals in the State of Kashmir.

After the seizure and division of Kashmir in 1947, the national status of Kashmiris varied depending upon which part of the divided territory they were residing in. For example in the Pakistan-held territory, children who are not born from a male Pakistani citizen are not Pakistani citizens¹⁶ and their passports state that they are 'citizens of the Former State of J&K but Domiciled in Pakistan'.¹⁷ On the other hand, children born in the Indian part of Kashmir after 26 January 1950 are considered citizens of India for the purposes of the Indian constitution, and the rest are 'stateless persons'. The seizure and incorporation of Kashmir into the Indian union is not recognised by the international community, which is clear in the Security Council resolutions.¹⁸

Further archival evidence relating to the statehood of Kashmir comes from a document created by the Government of British India's Foreign and Political Department in 1931¹⁹ (hereinafter Document 1931). Document 1931 concerned whether to take action against armed *Jathas* (from Punjab), who proceeded to Kashmir after making inflammatory speeches, or to leave them for the Kashmiri authorities to deal with at the border.²⁰ It was thought by the British Indian Legal Department that in the event that they would wish to take action against the armed *Jathas*, it had to be under Sections 125 and 126 of the Indian Penal Code 1860 (IPC), which had the potential to give rise to complications about whether Kashmir was a 'Power'. Section 125 of the IPC states:

14 Concession to acquire.

15 Permission to acquire.

16 FCO 37/914: British High Commission, Giles Bullard, Islamabad to H.C. Byatt, South Asian Department, FCO London, 25 January 1971 [NAL].

17 *ibid*; DO 35/10388: Status of a person born in Jammu and Kashmir [NAL].

18 A key example being Resolution 47 of 21 April 1948 [S/726] <<http://i.cfr.org/content/publications/attachments/47.pdf>> accessed 6 October 2016.

19 File No 498-P 1931; Government of India, Foreign and Political Department; Subject: Decision not to take action against Muslim Jathas under Sections 125 and 126 of the Indian Penal Code as the State is not a 'Power' [NAL].

20 *ibid*.

Whoever wages war against the Government of any *Asiatic Power in alliance or at peace with the Government of India* or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment for life, to which a fine may be added, or with imprisonment of either description for a term which may extend to seven years, to which a fine may be added, or with fine.²¹ (Emphasis added)

Section 126 states that:

Whoever commits depredation, or makes preparation to commit depredation, on the territories of any *Power in alliance or at peace with the Government of India*, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of any property used or intended to be used in committing such depredation, or acquired by such depredation.²² (Emphasis added)

This document clearly suggests that in the event that the Government of British India takes action under these sections, it would imply that Kashmir was an 'Asiatic power in alliance with his Majesty'.²³ The British Legal Department thought it would be desirable to have the opinion of the Legislative Department.²⁴ In this connection, Mr G.H. Spence of the Legislative Department, on 4 September 1931, commented:

*Application of the otherwise applicable Sections (125 and 126) would be excluded on the ground that Kashmir is not an Asiatic Power in alliance or at Peace with the King within the meaning of Section 125 or a Power in alliance or at Peace with the King within the meaning of Section 126 ... although I incline to the view that this question should be answered in the affirmative.*²⁵ (Emphasis added)

From the preceding paragraph it can be concluded that the decision not to take actions against the *Jathas* under Sections 125 and 126 was adopted purely

21 For text see <<http://www.vakilnoi.com/bareacts/IndianPenalCode/S125.htm>> accessed 20 November 2016.

22 *ibid.*

23 See, (n 19).

24 *ibid.*

25 *ibid.*

to avoid complications. Such a point of view is deduced from the evidence that the British Legislative Department was convinced that Sections 125 and 126 should have been applicable to the *Jathas*. It is clear that if the British Legal Department had decided to apply the sections in question to the *Jathas*, then they would have had to define at length the meaning of Power; Asiatic Power within the meaning of Sections 125 and 126; and Alliance at Peace and War with the King. They also would have had to explain why these sections applied to Kashmir. The Legislative Department of British India, however, took the position that all the Indian States were Vassal States and hence could not be powers. It is argued that this choice not to apply the sections in question to Kashmir was not based on any logical justification. Surprisingly, a quotation from Oppenheim was used in support of this position, coming into direct conflict with the conclusion that Kashmir is not a 'Power'. The referred text stated:

The fact that the *relation between the Suzerain and the Vassal always depends upon the special case, excludes the possibility of laying down a general rule as regards the position of Vassal States within the Family of Nations ...* the Suzerain absorbs these relations entirely, such Vassals remains nevertheless a *Half Sovereign State* on account of its internal independence, this is the position of Indian Vassal States in Great Briton [Britain] (Vol. 1, pp. 184–85).²⁶ (Emphasis added)

Oppenheim clearly suggests that Indian States are both Vassal States and half-sovereigns. Nonetheless, it is clear that he stated that the relationship of each Vassal State with the Suzerain varies from case to case. In other words, he suggested the 'level of sovereignty' from one Vassal State to another varies, hence making one Vassal State more sovereign than the other. The issue concerning statehood of the Indian States within international law has been discussed in some detail in Chapter 3. As discussed in Chapter 2, from a strategic standpoint, Kashmir had a higher level of sovereignty than the other Princely States.²⁷

Document 1931 concludes that Kashmir is capable of being at war or peace with the King. Mr G.H. Spence stated:

It may be held that Kashmir is capable of being at war with the King and consequently, not now being at war with the King, is at peace with the King within the meaning of Sections 125 and 126. In other words the only

²⁶ *ibid* 2.

²⁷ See, Chapter 2.

obstacle to the application of these sections is the difficulty of holding that Kashmir is a Power within the meaning thereof.²⁸

The whole issue becomes challenging as the major question about whether Kashmir is a 'Power' for the purposes of Sections 125 and 126 is not resolved. Since Kashmir was capable of being at war with Britain, the case of *The Queen V. Jameson & Others*²⁹ is applicable. In that case, the accused was convicted under Section 11 of the Foreign Enlistment Act 1870 for the offence of preparing, within the limits of Her Majesty's dominions and without licence, to proceed militarily against the South African Republic, which was a friendly state within the meaning of Section 11. At that time, the South African Republic was a state over which the British Crown exercised suzerainty under the Convention of 1881. The powers of the South African Republic were restricted to the exercise of internal sovereignty.

In *Mighell v. Sultan of Johur*,³⁰ which was later followed in *Duff Development Co v. Kelantan*,³¹ an order was set aside after communication was made to the Secretary of State for the Colonies to determine the status of the states in question. It was held that the statement in the letter from the Colonial Office had made it clear that the defendant states were independent sovereign states. The relationship was of alliance and not of suzerainty, regulated by the Treaty.³² It was also held that some dependence on the protecting power was not inconsistent with sovereignty.³³

Keeping in view the foregoing discussion, a reasonable conclusion is that if the foreign relations of a state are by agreement entrusted to another power, it does not remove the first power from the family of nations. In other words, the exercise of suzerainty by one power over another does not wipe out the existence of the second power as an international state. Applying intertemporal law,³⁴ keeping in view the fact that the relationship between the Princely State of Kashmir and Britain was based on the Treaty of Amritsar 1846 (TOA), it can be argued that Kashmir technically emerged as a member of the family of nations within international law. Article 9 of the TOA therefore enabled

28 See, (n 19), 2.

29 (1896) 2 QB 425.

30 (1894) 1 QB 149.

31 (1924) AC 797.

32 *Mighell*, (n 30), 149, 150; *Duff Development Co*, (n 31) 798.

33 *Duff Development Co* (n 31) 803.

34 RY Jennings, *Acquisition of Territory in International Law* (Manchester University Press 1963) 53–56.

the Government of Kashmir to call upon the suzerain power to actively aid in protecting its territory from 'external enemies'. The fact that Kashmir was a protectorate is reflected in the discussions of the National Committee for Commonwealth Immigration, Legal and Civil Affairs panel in consultation with Tom Kellock QC in 1967. The panel, citing Clive Parry,³⁵ came to the conclusion that: 'Kashmir was not ... a part of British India. As a consequence, their inhabitants were ... British protected persons'.³⁶

From the forgoing discussion it can be concluded that armed *Jathas* from Punjab were enemies for the purposes of Article 9 of the TOA. It was of utmost importance for Britain to apply Sections 125 and 126 on Kashmir to save it from those enemies. The discussion suggests that Kashmir was under the suzerainty of Britain and that its sovereignty was not compromised.³⁷

The Pre-1947 Statehood of Kashmir Prior to Its Seizure: The View of the British Government

The sovereignty of Kashmir was clearly acknowledged towards the end of the British dominion over India. At the time of the decolonisation of British India, a question immediately cropped up about the relationship between the Princely States and the new nations once paramountcy was withdrawn. In various official acts and statements, the British Government made its intentions clear: paramountcy was not transferable to the new dominions but would lapse. Hence, the British Government intended that the Princely States should be left free to join either of the dominions or to remain independent. However, these statements usually included indications that there was a fervent desire for the Princely States to choose to join one of the two new dominions. The question of paramountcy became particularly significant for Kashmir as the Maharaja chose not to accede to any of the dominions and hence chose independence.

Under the Government of India Act 1935 (GOIA), the claim made by the Princely States was recognised.³⁸ It was promised under the GOIA that

35 Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (Stevens and Sons Limited 1957) 841.

36 HO 213/1613 Date range: 1966–1969: National Committee for Commonwealth Immigrants, Legal and Civil Affairs panel (in consultation of Tom Kellock QC), 25 July 1967 [NAL].

37 *Duff Development Co*, (n 31) 803 [See the discussion on the relationship between suzerainty and sovereignty].

38 Clyde Eagleton, 'The Case of Hyderabad before the Security Council' (1950) 44 *American Journal of International Law* 277, 282.

paramountcy would not be transferred to a self-governing India. The idea of creating another dominion, Pakistan, had not been conceived of at that time. The Foreign Office Legal Adviser, Sir G. Fitzmaurice, endorsed this position in his legal opinion concerning Kashmir. Discussing the validity of the IOA, Fitzmaurice referred to GOIA and mentioned that Kashmir was still under the paramountcy of the British Crown.³⁹ In 1946, the British Cabinet Mission in India issued a statement saying that 'paramountcy can neither be retained by the British Crown nor transferred to the new Government'.⁴⁰ This was later reiterated in paragraph 5 of the Cabinet Mission Memorandum of 12 May 1946:

The rights of the State which flow from their relationship to the Crown will no longer exist ... all the rights surrendered by the States to the Paramount Power will return to the States.⁴¹

On 20 February 1947, Prime Minister Attlee informed Parliament that in relation to the Indian States, the British Government had the same position as stated by the Cabinet Mission. He added that:

*His Majesty's Government do not intend to hand over their powers and obligations under paramountcy to any Government of British India. It is not intended to bring paramountcy, as a system, to conclusion earlier than the date of the final transfer of power, but it is contemplated that for the intervening period the relations of the Crown with individual States may be adjusted by agreement.*⁴² (Emphasis added)

In the Statement of 3 June 1947 it was reiterated that paramountcy would not be transferred, and that His Majesty's Government policy towards the Indian States contained in the Cabinet Mission Memorandum of 12 May 1946⁴³

39 FO 371/69710: Foreign Office, Minutes, Mr Fitzmaurice, 'Validity of Kashmir's Accession to India', 25 and 27 February 1948.

40 Ijaz Hussain, *Kashmir Dispute: An International Law Perspective* (Quaid-i-Azam University 1998) 4.

41 FO 371/84244: Validity of Kashmir's Accession to India, 1950 [NAL].

42 HCPP, Paper No. 7047, 20th Century House of Commons Sessional Papers, Session 1946–47, Para 12.

43 HCPP, Paper No, Cmd. 6835.

remained unchanged.⁴⁴ The Prime Minister repeated this view on 10 July 1947.⁴⁵ Lord Listowel, Secretary of State for India and Burma, stated in the House of Lords on 16 July 1947:

From that moment the appointments and functions of the Crown Representative and his officers will terminate and the States will be the masters of their own fate. They will then be entirely free to choose whether to associate with one or the other of the Dominion Government or to stand alone, ...in the fullness of time all the States should find their appropriate place within one or the other of the new Dominions.⁴⁶

Lord Mountbatten also reiterated the provisions of the Cabinet Mission Memorandum in his Crown Representative Address to the Chamber of Princes on 25 July 1947.⁴⁷ However, Mountbatten, who was a friend of Nehru, was already contemplating becoming the first Governor General of India. This is reflected in his address advising the Princes that 'every wise ruler and wise government would desire to link up with great dominion of India'.⁴⁸ In any case, the choices became clear to the Princes: accession to India or Pakistan, or a declaration of full sovereignty and independence. Paramountcy was withdrawn so as to authorise the Princely States to regain their complete sovereignty.⁴⁹

The line of action adopted by Mountbatten gave a tight time frame to the Princes, which was frustrating for Lord Listowel. He wrote a letter on 29 July 1947 to Prime Minister Attlee to draw his attention to the fact that the ultimatum that Mountbatten had given to the Princes, which was that they must join either of the dominions before 15 August 1947, was 'not altogether consistent with what was said on the subject of the States in Parliament'. He was of the opinion that:

It seems to me desirable to draw the Viceroy's attention to these inconsistencies so that in any further discussions he may have with States' representatives he may avoid emphasising these points further ... Viceroy is

44 Indian Policy, Statement of 3 June 1947 (London: HMSO) Paper No. Cmd. 7136, Session 1946–47.

45 *HCOR*, 439 H. C Debates. 55, c2451. Also see the Statement of the Secretary of State for India on 16 July 1947, House of Lords, Official Report, 150 H.L. Debates. 58, c. 811.

46 *HLOR* and 150 H.L Debates. 58, c 812.

47 FO 371/84244: Validity of Kashmir's Accession to India, 1950 [NAL].

48 *ibid.*

49 *ibid.*

acting as a mediator ... we are therefore answerable in a special way for what he may do and it would seem advisable to warn him of the dangers, particularly in view of the importance which the Opposition attaches to no pressure being put upon the Princes *by us*.⁵⁰

Lord Listowel sent a telegram to Mountbatten on 2 August 1947 expressing his and Attlee's concern over this matter. Mountbatten was informed that the government spokesman in Parliament had made it clear that the states might need some time to make up their minds and might want to sign the Standstill Agreement.⁵¹

In preparation for British India's decolonisation, the Indian Independence Act 1947 (IIA) under Section 7(1) (b), clarified the British Government's position, which was that 'paramountcy is not transferable in any circumstances' and would simply lapse.⁵² However, Section 7(1) (a) of the IIA did mention that the British Government was not responsible to the 'government of any of the territories which, immediately before that day (15 August 1947), were included in British India'.⁵³ Hence, Section 7 of the IIA 1947 needed more explanation as to the status of the Princely States that did not accede to India or Pakistan on or before 15 August 1947. There is strong evidence that Mountbatten and Congress became aware of this loophole just after this act was drafted. Both wanted to make sure that nothing was added to the IIA and that nothing was said during the parliamentary debates that would result in the recognition of the possibility of the Princely States not acceding to any of the dominions. In order to overcome this problem, Mr Menon (as Nehru's right-hand man) was sent to London to brief the Prime Minister and to hand over a 'note' from Nehru to him. The letter from Menon to Mountbatten, dated 18 July 1947, corroborates these facts:

Your letter and a personal note from Nehru which I brought here were sent to Downing Street on Sunday ... PM saw me at 10 the next morning. You have educated them all in hustling! ...*I then tried to put our case about the States*. He called in the Law Officers and Henderson, and we

50 Letter of the Earl of Listowel to Mr Attlee L/P&S/13/1848: ff 133–34, India Office, 29 July 1947 in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO 1983) vol XII, 403.

51 Lord Listowel telegram to the Mountbatten on 2nd August 1947 in Henry Vincent Hodson, *The Great Divide* (Hutchinson 1969) 367.

52 The Indian Independence Act 1947.

53 *ibid* section 7 (1) (b).

had about seventy minutes over it. Mr Attlee was anxious to help. *We went over the amendments to Clause 7, and even tried some other devices ...* I have also seen Listowel, Henderson and Cripps, all of whom promised to do what they could in speeches to indicate that H.M.G would not welcome Balkanisation of Dominion status for Princes. All of these were very co-operative.⁵⁴ (Emphasis added)

In a telegram from Mountbatten to the Earl of Listowel on 12 July 1947, Mountbatten stated:

Any attempt made in Parliament to define position of States not acceding to Dominion in respect of External affairs would I suggest be premature and might indeed prejudice successful outcome of discussions here.⁵⁵

It seems rather clear that Mountbatten, in collaboration with Congress, made a deliberate effort not to rectify ambiguities in the IIA 1947 regarding the territories that did not accede to any of the dominions. It is presumed that such crafty actions were undertaken to make it easier for India to seize Kashmir if it did not accede to India.

In light of Section 7 (1) (b) after 15 August 1947, paramountcy over Kashmir lapsed. Kashmir, by not acceding to any of the dominions before 15 August 1947, which was the deadline for accession, became independent. The intention of the Maharaja of Kashmir to remain independent became obvious when he sought to enter into the Standstill Agreements with both India and Pakistan, in accordance with the IIA 1947.⁵⁶ The Maharaja sent identical telegrams to both the dominions on 12 August 1947. Pakistan agreed to a Standstill Agreement

54 Letter of Mr Krishna Menon to Rear-Admiral Viscount Mountbatten of Burma (Extract), Mountbatten Papers, Demi-official Correspondence Files: Menon, V.K. Krishna, 47 Strand, London, W.C.2, 18 July 1947 in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO 1983) 255–56.

55 Telegram, R/3/1/138: f 131, Rear-Admiral Viscount Mountbatten of Burma to the Earl of Listowel, New Delhi, 12 July 1947 in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO 1983) 126; also quoted in Shabir Choudhry, 'Kashmir and the Partition of India the Politicians and the Personalities Involved in the Partition of India Particularly in Relation to the Position of Kashmir at the Moment of Independence on 15 August 1947' (MPhil thesis, University of Bradford 1990) 186.

56 FO 371/129777: Foreign Office: Political Departments: General Correspondence from 1906–1966 DY1041/301: Memorandum handed by Mr Nehru to the UK Prime Minister, 5 July 1957, on legal case surrounding Kashmir [NAL].

on 15 August 1947.⁵⁷ The Standstill Agreement was a settlement pending any accession and the formal execution of new agreements.⁵⁸ As far as India was concerned, she was in the process of negotiating such an agreement,⁵⁹ but it was never signed. The execution of the Standstill Agreement with Pakistan and the negotiation of such an agreement with India clearly meant that none of the dominions were entitled to exercise any paramountcy over Kashmir.⁶⁰ In light of the various official acts and statements from the British Government, it is apparent that Kashmir at the time of British India's decolonisation became completely independent – a fact that both India and Pakistan had accepted.⁶¹ Therefore, it is argued that from the decolonisation of British India (15 August 1947) to the occupation on 26 October 1947, Kashmir was completely independent.

Kashmir's Statehood: A Legal Evaluation

As discussed in Chapter 3, the basic concepts underpinning international law such as sovereignty and statehood, etc., are haunted by indeterminate normative standards. As Kennedy argued, the foundational contradiction of modern liberal thought lies in legal indeterminacy and the use of law to legitimate oppression.⁶² Clearly, in that respect, 'the law' is 'the problem' itself, not a panacea. The nineteenth-century positivist and classical lawyers who created the normative content of international law did so for the consumption of European states. In the European positivist discourse on international law, colonialism is treated as a consequence of the interaction between a European sovereign and a non-European entity, where the former exercises its sovereignty and liberty,

57 Statement of the Representative of Pakistan, Sir Mohammad Zafrullah Khan, SC, SCOR, 3rd Year, 229th Mtg, 17 January 1948, 101–02.

58 FO 371/129777: Foreign Office: Political Departments: General Correspondence from 1906–1966 DY1041/301: Memorandum handed by Mr Nehru to the UK Prime Minister, 5 July 1957, on legal case surrounding Kashmir [NAL].

59 K Sarwar Hasan (ed), *The Kashmir Question – Documents on the Foreign Relations of Pakistan* (Pakistan Institute of International Affairs 1966) 44.

60 Article 3 of the Draft Standstill Agreement between Dominion and States published in Man Singh Deora and Rajinder Grover (eds), *Documents on Kashmir Problem* (Discovery Publishing House 1991) 39–40.

61 Sikander Shah, 'An In-depth Analysis of the Evolution of Self-Determination under International Law and the Ensuing impact on the Kashmiri Freedom Struggle, Past and Present' (2007) 34 Northern Kentucky University Law Review 29, 43.

62 Duncan Kennedy, 'The Structure of Blackstone's Commentaries' (1979) 28 Buffalo Law Review 211.

neither of which the latter was deemed to possess.⁶³ Hence, mainstream public international law is not devoid of secretive interests and class domination, which, according to CLS scholars are entrenched in liberal legalism and the jurisprudence of legal positivism.

It is rather obvious that at the metaphysical level, the meaning of 'nation state' varies based on perspectives and approaches to understanding international law. For instance, adopting an existentialist perspective, the idea of statehood may not only depend upon its European normative objectivity, but also upon its relative civilisational standards. As discussed in this text, historically Kashmir was a functional sovereign state with its own civilisational values. Clearly the analysis of the statehood of non-European entities like Kashmir is significant, particularly because positivist international law apart from hiding behind self-created technical claims of neutrality, determinacy, and objectivity, has no more to offer in describing the historical and ongoing bloody war in Kashmir. The unresolved Kashmir question through the last 69 years and counting, is yet another demonstration of Western colonisers' dehumanising conduct and lack of moral accountability in its third world colonies.⁶⁴ Hence, to make sense of this historical and normative indifference, the falsity of the law/violence dichotomy,⁶⁵ and the lack of moral accountability towards the non-European entity of Kashmir, a multidisciplinary and extended paradigm must be adopted. I argue that despite the injustices and cruelty of international law towards the third world, there is some hope in the transformative potential of law that is capable of constraining power.⁶⁶

The statehood of Kashmir, as suggested by Document 1931, may not be comparable to European nations such as the United Kingdom.⁶⁷ It may not even be seen as rooted in Westphalian statehood. However, it is clear, as per Document 1931, that the 'level of sovereignty' of Kashmir – even if seen as a half-sovereign or Vassal State – was sophisticated in comparison to the rest

63 See generally, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Co 1989) Ch 4.

64 Jean-Paul Sartre, *Colonialism and Neocolonialism* (Azzedine Haddour, Steve Brewer and Terry McWilliams trs, Routledge 2001).

65 See generally, Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (Telos 2003).

66 Antony Anghie and BS Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts' (2003) *Chinese Journal of International Law* 77, 100–01.

67 Daniel H Cole, 'Poland's 1997 Constitution in Its Historical Context' (1998) *St Louis-Warsaw Transatlantic Law Journal* 1.

of the Indian Princely/Native States. Document 1931 clearly demonstrates that the British Government was inclined to the view that Kashmir was a sovereign State. It is argued that the very existence of Document 1931 shows the superior sovereignty of Kashmir, as there is no parallel British Indian Foreign and Political Department document where the sovereignty of other Princely States was debated. A thorough analysis of Document 1931 shows that under the terms of Article 9 of the TOA 1846, Kashmir was in fact a protectorate of the British. Article 9 of this Treaty clearly stated that 'the British Government will give its aid to the Maharaja in protecting his territories from external enemies'.

Even under mainstream public international law, Kashmir emerges as a protectorate, and this is corroborated by the fact that during the 1931 political agitation in Kashmir British Indian troops, including the Rifle Brigade, Border Regiment, and the 13th/18th Hussars, were employed for the protection of Kashmir.⁶⁸ The analysis of cases like *The Queen v. Jameson & Others*,⁶⁹ *Mighell v. Sultan of Johur*,⁷⁰ and *Duff Development Co v. Kelantan*⁷¹ also support the fact that the relationship between Kashmir and Britain was not only of suzerainty, as with the other Princely States, but also that of *alliance* due to the presence of a treaty. This alliance was not diminished by the fact that, under the TOA, Kashmir was militarily dependent on Britain, which in no way deprived it of its sovereignty.⁷² Kashmir, within its own 'system of civilisation',⁷³ was a sovereign state and comparable to other non-European colonial nations.

Although the other aspects of the IOA will be discussed later in the chapter, it is significant to mention here that the execution of the IOA by the Maharaja did not affect Kashmir's sovereignty. In other words, the provisions of the IOA suggest that Kashmir became a protectorate of India, as she agreed to protect Kashmir⁷⁴ in exchange for the execution of the IOA by the Maharaja. The Supreme Court of India, in the case of *Prem Nath Kaul v. Jammu & Kashmir*, observed:

68 File No: 586-P; Government of India, Foreign and Political Department (Political) Subject: Question in the Legislative Assembly by Rai Bahadur Sukhraj Rai regarding the Kashmir Disturbances, 1931 [NAI].

69 *The Queen v. Jameson & Others* (1896) 2 QB 425.

70 *Mighell v. Sultan of Johur* (1894) 1 QB 149.

71 *Duff Development Co*, (n 31).

72 See, discussion on sovereignty in *ibid* 803.

73 Gerrit W Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press 1984) 6.

74 The Instrument of Accession 26 October 1947, Para 3 & Schedule A.

We ... reject the argument that the execution of the Instrument of Accession, affected in any manner the legislative, executive and judicial power in regard to the Government of the State [*Kashmir*], which then vested in the ruler of the State.⁷⁵ (Emphasis added)

Hence, it was clear that the Supreme Court of India, in a case that was decided in 1959 (after the execution of the IOA), was of the opinion that the execution of the IOA did not affect the sovereignty vested in the ruler of the State of Kashmir. This is because, under the provisions of the IOA, Kashmir was a protectorate. The court based its judgment on *Sayce v. Ameer Ruler of Bhawalpur State*.⁷⁶ In that case a writ was issued in an action for damages for breach of contract against the Ameer (ruler) of Bhawalpur state. The writ was set aside on the ground that Ameer was entitled to immunity as the ruler of the foreign sovereign state.

The letter from the CRO stated that the State of Bhawalpur was not a part of His Majesty's dominions and that the Ameer, within the limitations imposed upon him by the constitutional arrangements contained in the IOA in relation to Pakistan on 3 October 1947, was the sovereign ruler of the state.⁷⁷ Consequently, it was made clear that the effect of the IOA was neither to make any state a part of the dominion nor to dispossess it of its sovereignty. It is argued that the terms of agreement in the IOA expressly reserved the sovereignty vested in the Maharaja of Kashmir.⁷⁸ The reservation of the sovereignty clause in favour of the Maharaja in the IOA suggests that Kashmir was only a protectorate of India after 1947. The IOA did not make it part of the dominion of India.

It is argued that in the pre-1947 setting, the Princely States and other non-European nations were in effect subjected to European normative standards of sovereignty, which created a conceptual framework⁷⁹ dictating the only possible way these nations could be seen to exist. Lorimer notes that the non-European States that were unable to meet the European standards of civilisation were

75 AIR 1959 SC 749; *Rehman Shagoo v. State of Jammu and Kashmir* AIR 1960 SC 1. This was an appeal against the Big Landed Estate Abolition Act XVII of 2007 (1950) enacted by Yuvraj Karan Singh which transferred the land to tillers. The appeal was dismissed.

76 [1952] 2 QB 390 (CA).

77 *ibid.*

78 Parry, (n 35) 844.

79 Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1, 68.

relegated to having inferior status in international law.⁸⁰ Notwithstanding this, the European approach to the standards of sovereignty, as Gong notes, did not affect the statehood of non-European states that had their own set norms of civilisation.⁸¹ As discussed in Chapter 3, state practice has shown that for determining the statehood of the former colonies, a lesser degree of effective control is required than is compulsory under the jurisprudence of legal positivism. The above discussions suggest that Kashmir was an efficient political administrative unit and was therefore a real, existent, and functional sovereign state within its own right.

Kashmir's sovereignty and consequent independence became clear after the discussed British official acts and statements were issued. Particularly significant are the GOIA 1935, Cabinet Mission Memorandum 1946, and Crown Representative Address (by Lord Mountbatten) to the Chamber of Princes 1947 and IIA 1947. All the above, along with the other official statements discussed, logically suggest that after the lapse of British paramountcy (which was non-transferable⁸²) Kashmir became an independent state. This conclusion is valid despite Mountbatten's efforts to make sure no explanation was added to clarify the ambiguity of Section 7 of the IIA 1947. Kashmir did not accede to any of the dominions by the deadline, which was 15 August 1947, and hence became independent. The existence of the Standstill Agreement between Kashmir and Pakistan also supports the finding that Kashmir was independent. Crawford argues that initially the Crown regarded the Indian States as inferior. However, the Crown made its view as to paramountcy clear and visualised the Indian States as being free to accede to India or Pakistan or neither, and that no constitutional authority was thought to exist to force such accession.⁸³

The Princely State of Kashmir both before and after 1947, was compatible with the corporeal and objective definition of a state under Article 1 of the Montevideo Convention 1933. Kashmir had a permanent population; a defined territory; a functional government; and capacity to enter into relations with other states.⁸⁴ Consequently, Kashmir exhibited adequate sovereignty to be classed as a state.

80 Quoted in Gong, (n 73) 6.

81 *ibid* 8.

82 The Indian Independence Act, 1947, s 7 (1) (b).

83 James R Crawford, *The Creation of States in International Law* (Clarendon Press 1979) 211.

84 Montevideo Convention on the Rights and Duties of States (1933). For the full text see, Ilias Bantekas (ed), *Sweet & Maxwell's Statutes Series; Public International Law 2002/03* (Sweet & Maxwell 2002) 3–5 at 3.

The Illegal Seizure of the Princely State of Kashmir by India

In order to evaluate the legality of the IOA, it is necessary to enter into a broad dialectical debate and examine a series of episodes in political/legal history that show the role of the West (primarily through British officials) and the non-Western leaders of the two dominions. This knowledge will inform us of how history was shaped to the advantage of India with the support of British officials. The law cannot be merely understood as black letters but rather as a continuing and comprehensive process of communication. As per the Yale School approach, the law-making process entails a vast series of communications directed towards a target audience. Each communication contains policy content, an authority signal, and a control intention indicated by the communicators.⁸⁵ Likewise, according to Critical Legal Studies scholars, the normative rules of international law are not accidental creations of nineteenth-century lawyers but, rather, deliberate attempts to keep the structure of legal arguments 'objective'⁸⁶ by concealing power, politics⁸⁷ or other ideological considerations under a carpet of illusion, when, in reality, these illusive considerations guided the law.⁸⁸ Many contemporary approaches to understanding international law emphasise that to know the law one cannot solely rely on formal agreements and other textual statements. One must also observe communicators, as well as take in subjective considerations like power politics. In relation to the Kashmir question, the role of communicators on each side prior to and at the relevant time of the signing of the IOA must be reviewed. This in turn can explain the legal validity of the IOA and, to a significant extent, articulate a pattern of Western imperialism/hegemony and Eastern subordination.

A convenient place to start is by reviewing the events of the latter part of 1946, when differences between Viceroy Field Marshal Sir Archibald Wavell (1943–1947) and Congress leader Nehru started to emerge. Wavell had explored all the possibilities for maintaining an amalgamated Indian union, but to no avail.⁸⁹ In order to transfer power, it was thought that a fresh face with a new

85 W Michael Reisman, 'International Law-making: A Process of Communication' (1981) Faculty Scholarship Series. Paper 713. <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1719&context=fss_papers> accessed 20 November 2016.

86 Koskenniemi (n 63) 226–33.

87 Marti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4.

88 Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits on Legal Imagination in International Affairs* (Manchester University Press 1986) 43.

89 IOR/R/1/1/128: Wavell's Personal notes after his discussion with Nehru, 26 May 1946 [BL].

approach was desperately needed.⁹⁰ To this end, Jinnah and Nehru accompanied Wavell to London in December 1946 for consultations. Sir Stafford Cripps, Chancellor of the Exchequer in Attlee's government, brought Nehru and Mountbatten together. Cripps told Nehru that if he felt that he and Mountbatten could work together, he would do his best to get Mountbatten appointed as Viceroy in Wavell's place.⁹¹ Cripps suggested Mountbatten's name as the last Viceroy of India, after having secret meetings with Krishna Menon (Nehru's right hand man) in December 1946. Menon suggested that Congress saw little hope of progress in India as long as Wavell was Viceroy, and advanced the name of a man Nehru held in the highest regard – Lord Louis Mountbatten – as a possible substitute.⁹² In fact, during this political deadlock in British India, it was the Congress leader Nehru who chose the successor to Wavell and not Jinnah.

Mountbatten described Jinnah in his first formal meeting as being in a 'most frigid, haughty and disdainful frame of mind',⁹³ but praised Nehru and said that he, 'is delighted in Nehru's charm, his culture and his quick humour'.⁹⁴ Hodson, commenting on Nehru and Mountbatten, said, 'The two men were often said to be hand in glove',⁹⁵ and notes that 'the official relationships influence people's political attitude'. He further notes that 'there is no doubt where between the two dominions Lord Mountbatten heart lay'. His relations in day-to-day politics had been with Pandit Nehru and Sardar Patel, rather than Liaquat Ali Khan (right-hand man of Jinnah and later the first Prime Minister of Pakistan).⁹⁶ Hence, it is clear where Mountbatten's loyalty rested right from the very beginning, which as we will discuss, was reflected in his every decision.

The second episode was Mountbatten's 3 June 1947 plan, where it was made clear that two dominions would be carved out of British India.⁹⁷ The accession of the Princely States was high up on the agenda of the Congress party. For this

90 Larry Collins and Dominique Lapierre, *Freedom at Midnight* (Granada 1976) 9.

91 Sudhir Ghosh, *Gandhi's Emissary* (The Crescent Press 1967) 44.

92 Collins and Lapierre, (n 90) 9.

93 MB1/D21/23 Typescript copy of Viceroy's Conference Paper No 22 from Lieutenant Colonel V.F. Erskine-Crum concerning the Viceroy's Personal Report No 2, 9 April 1947, Para 12 [Mountbatten Papers, Special Collections Databases, University of Southampton].

94 Dominique Lapierre and Larry Collins, *Mountbatten and the Partition of India, March 22–August 15 1947* (Garlandfold Ltd 1982) 16.

95 Henry Vincent Hodson, *The Great Divide* (Hutchinson 1969) 215.

96 *ibid* 395.

97 MB1/D15/6: Discussion no 6 at the Viceroy's 13th staff mtg, the Viceroy reporting on difficult discussions with Jinnah about the creation of an independent Pakistan 7–12 April 1947 [Mountbatten Papers, Special Collections Databases, University of Southampton].

purpose Sardar Patel was put in charge of the State Department and his job was to motivate the Princely States to accede to the dominion of India. Indeed, he persuaded the Princes of most States to accede to India.⁹⁸ Kashmir was one of the Princely States, along with Junagadh and Hyderabad that had not decided whether to accede. Kashmir was strategically important and there was also Nehru's 'emotional attachment' to Kashmir, as it was his ancestral homeland.⁹⁹ Archival documents suggest that there was strong lobbying for the accession of Kashmir to India. This is clear in Mountbatten's comments on Nehru's 'emotional attachment' to Kashmir in his Personal Report No 15, where he wrote:

I have reason to believe that when Patel had tried to reason with Nehru the night before our meeting, Nehru had broken down and wept, explaining that Kashmir meant more to him at the moment than anything else.¹⁰⁰

Clearly, this 'emotional attachment', coupled with the 'hand in glove' friendship with Mountbatten, stretched a long way and a process of 'intimidation and compulsion' was put in place to force Maharaja Hari Singh of Kashmir to accede to India. In order to achieve this goal Mountbatten visited Kashmir, staying from 18 to 23 June 1947. He had several preliminary meetings with the Maharaja and with his Prime Minister RC Kak. As discussed in Chapter 2, for the Maharaja, the year 1947 was a very difficult time as he had to deal with pressure from local parties and a civil war in Poonch, as well as pressure from the political leaders of British India and Viceroy Mountbatten. Archival documents further suggest that the Maharaja had made up his mind to opt for independence, so he avoided any further personal meetings with Mountbatten¹⁰¹

98 John McLeod, *History of India* (Greenwood Publishing Group 2002) 129–30.

99 Victoria Schofield, *Kashmir in the Crossfire* (Viva Books Pvt. Ltd 1997) 121.

100 MB1/D30/7 Copy of Viceroy's Conference Paper No 149 enclosing a copy of the Viceroy's Personal Report No 15 and a copy of a covering letter to the Secretary of State for India and Burma, 2 August 1947: contemporary copy 33 [Mountbatten Papers, Special Collections Databases, University of Southampton].

101 MB1/D26/5 Copy of Viceroy's Conference Paper No 96 enclosing a copy of the Viceroy's Personal Report No 10 and a copy of a covering letter to the Secretary of State for India and Burma, 28 June 1947, Para 30 [Mountbatten Papers, Special Collections Databases, University of Southampton].

and gave him little chance to discuss accession and thus played for time.¹⁰² However, Mountbatten advised the Maharaja to sign the Standstill Agreement with both India and Pakistan.¹⁰³ On his visit to Kashmir, Mountbatten also took a 'Note on Kashmir' from Nehru for the Maharaja. The language of the note was aggressive:

The situation in Kashmir cannot be effectively met without major changes ... if this course is not adopted, the Maharaja's position will become progressively more insecure. If, however, the Maharaja gives a lead in this direction by joining the Constituent Assembly of India ... the immediate steps that appear to be essential are the removal of Mr Kak for the Prime Ministership, and the discharge of Sheikh Abdullah and his colleagues from prison ... What happens to Kashmir is, of course, of the first importance to India as a whole ... because of the great strategic importance of that frontier State ... The resources of the State are very great; ...*If any attempt is made to push Kashmir into the Pakistan Constituent Assembly, there is likely to be much trouble ... the normal and obvious course appears to be for Kashmir to join the Constituent Assembly of India.*¹⁰⁴ (Emphasis added)

The tone of the note read like a directive and instructed the Maharaja to remove PM Kak. Yuvraj Karan Singh, son of Maharaja Hari Singh, described Kak as 'the man who had the intellectual capacity'.¹⁰⁵ He was nationalist and believed in the independence of Kashmir, despite being a Kashmir Hindu (Pundit). Nehru believed him to be the main force behind the Maharaja's reluctance to join India¹⁰⁶ and hence wanted him out of office. He also had an interest in seeing Abdullah free due to his personal friendship with him, and saw Abdullah's party, the National Conference, as a partner of Congress.

Choudhry writes that after Mountbatten's trip to Kashmir he was accused of having gone on a Congress assignment to secure Kashmir's accession to India

102 Karan Singh, *Heir Apparent: An Autobiography* (OUP 1982) 48.

103 Schofield, (n 99) 122.

104 Letter from Pandit Nehru to Rear-Admiral Viscount Mountbatten of Burma R/3/1/137: ff 90–98, 17 York Road, 17 June 1947 (paras 22, 23 & 27) in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO 1983) vol XI, 442–48.

105 Singh, (n 102) 55.

106 Alastair Lamb, *Birth of a Tragedy: Kashmir 1947* (Roxford Books 1994) 52.

or, if nothing else, at least to get assurances that the Maharaja would not prematurely declare independence.¹⁰⁷ Sir Conrad Corfield, the Political Advisor to the Viceroy from 1945–1947, was of the opinion that Mountbatten consistently ignored the advice of the British Indian Political Department and the British policy on the Indian States. Corfield revealed that his advice, given in the capacity of a Political Advisor, carried no weight against the long-standing friendship with Nehru, whose desire was to keep Kashmir in India.¹⁰⁸ Mountbatten ignored Corfield's advice and visited Kashmir. Contrary to the British practice, he did not take his political advisor with him. Corfield's personal thoughts on British policy in the Indian States suggests that Mountbatten was simply acting in his personal capacity and ignoring his advice because his friend Nehru was determined to secure the accession of Kashmir to India.¹⁰⁹ Mountbatten also rejected Corfield's advice on the question of Kashmir and Hyderabad. Corfield had suggested that Kashmir and Hyderabad should be used in a deal between India and Pakistan because the former was a Muslim majority state with a Hindu ruler and the latter was a Hindu majority state with a Muslim ruler. This was to try to assist India and Pakistan to come to an agreement. However, this proposal was rejected outright by Mountbatten.¹¹⁰

Nehru was not pleased with the results of Mountbatten's visit to Kashmir. In a letter to Mountbatten, he wrote:

Your visit to Kashmir was from my point of view not a success, things continued as before. Indeed there was considerable disappointment at the lack of results of your visit ... Kashmir had become a first priority for me.¹¹¹

After Mountbatten's unsuccessful trip to Kashmir, Lord Hasting Ismay, Mountbatten's Chief of Staff, was sent to Kashmir. He received the same treatment and there was no serious deal made relating to accession.¹¹²

¹⁰⁷ Choudhry, (n 55) 206.

¹⁰⁸ Sir Conrad Corfield, 'Some Thoughts on British Policy and the Indian States 1935–47', quoted in CH Philips and Mary Doreen Wainwright (eds), *The Partition of India, Policies and Perspectives 1935–1947* (George Allen and Unwin 1970) 531.

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ Letter from Nehru to Mountbatten, 27 July 1947 in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO, London 1983) vol XII, 368.

¹¹² Hastings Lionel Ismay, *The Memoirs of General the Lord Ismay* (William Heinemann 1960) 433.

Mountbatten, in his personal report on 2 August 1947, mentioned that 'Nehru is hankering' to visit Kashmir himself. Mountbatten was of the opinion that Nehru was probably still suffering from the emotional upset caused by his arrest in Kashmir.¹¹³ On 18 June 1947, Nehru was arrested when he tried to enter Kashmir to express his benevolence to Abdullah without the Maharaja's permission. He was arrested in Domel under the orders of the Maharaja and detained for two days.¹¹⁴ It must have been a shock for Nehru, who was at that time one of the acknowledged leaders of the Congress and the 'would-be Prime Minister' of free India. Clearly, as late as 1947, the Maharaja was in a position to exert his sovereign authority in any manner he desired, and the British Government had no control over him.

After Nehru's arrest, Mountbatten contacted the Maharaja to request that Nehru be allowed to visit Kashmir but the Maharaja refused.¹¹⁵ The Mountbatten Papers and Special Collections Databases suggest that Mountbatten was aware that PM Kak and the Maharaja detested Nehru with a 'bitter hatred'.¹¹⁶ He was also conscious that a visit by any Congress leaders to Kashmir would be taken badly by the press. Mountbatten, however, suggested that:

It can be somewhat mitigated if Gandhi went, on account of the religious aura that surrounds him; whereas if Nehru went it would be regarded as a piece of straightforward political lobbying.¹¹⁷

This clearly shows that Mountbatten was already acting in the interests of India while he was still Viceroy. Gandhi stayed in Kashmir up to 4 August 1947 and during that time he met the Maharaja and all his family. This was followed by the removal of PM Kak, and General Janak Singh was installed on 11 August 1947 as the new Prime Minister of Kashmir.¹¹⁸ Clearly the removal of PM Kak

¹¹³ MB1/D30/7 Copy of Viceroy's Conference Paper No 149 enclosing a copy of the Viceroy's Personal Report No 15 and a copy of a covering letter to the Secretary of State for India and Burma, 2 August 1947: contemporary copy, Para 25 [Mountbatten Papers, Special Collections Databases, University of Southampton].

¹¹⁴ MAK Azad, *India Wins Freedom* (Orient Longmans 1959) 148–49.

¹¹⁵ MB1/D30/7 at 25 [Mountbatten Papers, Special Collections Databases, University of Southampton].

¹¹⁶ *ibid* 27.

¹¹⁷ *ibid* 28.

¹¹⁸ Choudhry, (n 55) 212.

accomplished Congress's demand exactly in the way it was stated in the 'comprehensive note' from Nehru to the Maharaja forwarded through Mountbatten. As Bazaz notes, the appointment of Janak Singh caused grave tension in the state.¹¹⁹

Evidence of the Maharaja being compelled to accede to India can also be found in the irregularities that were committed by the Radcliffe Commission, in consultation with Mountbatten. As discussed in Chapter 2, after it became impossible for Mountbatten to strike a deal for a united India he announced in his 3 June plan to transfer power,¹²⁰ which also required the partition of Punjab, Bengal, and Assam-Sylhet¹²¹ on the basis of the Two Nation Theory. The Radcliffe Commission was set up on 30 June 1947 to divide said territories. However, the Commission awarded the Muslim majority area of Punjab, Gurdaspur, to India, hence providing it the only possible land access to the Princely State of Kashmir.¹²² After Lord Ismay received a letter from Liaquat Ali Khan about the award of Gurdaspur to India, Ismay responded in a letter saying:

I am dumbfounded to receive the private message which you have sent me through Mahommed Ali. As I understand it, the gist of the message is ... Gurdaspur ... has been given to East Punjab by the award of the Boundary Commission. The report is that this is a political decision, and not a judicial one: If this is so, it is a grave injustice which will amount to a breach of faith on the part of the British.¹²³

The Radcliffe award was not disclosed until after 15 August 1947, although Mountbatten knew on 8 August that Gurdaspur had been award to India despite its Muslim majority.¹²⁴ Seemingly, India deferred the signing of a Standstill Agreement with the Maharaja to wait for the Radcliffe decision. Menon's statement corroborates this fact in the following words:

119 Prem Nath Bazaz, *The History of Struggle for Freedom on Kashmir* (Kashmir Publishing Company 1954) 275.

120 AC Banerjee, *The Making of the Indian Constitution 1939–1947* (A Mukherjee 1948) 443. Digitised 25 May 2006.

121 Hodson, (n 51) 346.

122 David Butler, *Lord Mountbatten: The Last Viceroy* (Preston, Magna 1987) 201.

123 Letter from Lord Ismay to Mr Liaquat Ali Khan, 11 August 1947, R/3/1/157: f 274 in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO 1983) vol XII, 662.

124 Choudhry, (n 55) 216.

We want the time to examine its [Standstill Agreement's] implications ... as a result of Radcliffe award the State [Kashmir] had become connected by road with India.¹²⁵

Menon's view suggests that land access to Kashmir was a result of Nehru's political lobbying, which later resulted in forced accession and the invasion of Kashmir by India. Objectively Kashmir, by not joining any of the dominions by 15 August 1947, became independent. The partition of British India and accompanied irregularities by the Radcliffe Commission brought with it the mass migration of Hindu and Muslim populations and a wave of mass killings. By that time, the political unrest in Kashmir was worsening and protestors were rioting, especially in Poonch. The Maharaja's army slaughtered the Muslim population in Jammu. Out of 500,000 Muslims in Jammu, as many as 200,000 were murdered and the rest fled for their lives to Pakistan.¹²⁶ As discussed in Chapter 2, news of this resulted in the tribesmen's attack from the NWFP on 22 October 1947, which they claimed was for assisting their fellow Muslims in Kashmir. The Pathan tribesmen arrived in 200–300 trucks¹²⁷ and plundered, looted, and killed people.¹²⁸

The last Commander-in-Chief of undivided British India, Field-Marshal Auchinleck, was appointed as Supreme Commander on 30 September 1947¹²⁹ and stayed until the end of November 1947¹³⁰ for the purpose of partitioning the armed forces between India and Pakistan. According to Menon, when Auchinleck received a message from Pakistani army headquarters giving information about the raiders' advance, he very rightly passed it on to the GOI.¹³¹ The news of tribal attack in Kashmir reached India on the evening of 24 October 1947¹³² and the next day the Indian Defence Committee, on which Mountbatten sat, decided that Menon should fly to Srinagar immediately to investigate.¹³³ Menon was dispatched to Srinagar in a Royal Indian Air Force

125 VP Menon, *The Story of the Integration of the Indian States* (Orient Longmans 1961) 377.

126 William Baker, *Kashmir Happy Valley, Valley of Death* (Defenders Publications 1994) 21.

127 Menon, (n 125) 378.

128 Alastair Lamb, *Incomplete Partition – The Genesis of the Kashmir Dispute 1947–1948* (OUP 2003) 237.

129 *ibid* 233.

130 *ibid* 231.

131 Menon (n 125) 379.

132 Collins and Lapierre, (n 90) 406.

133 Alastair Lamb, *Kashmir-A Disputed Legacy 1846–1990* (OUP 1992) 135.

DC-3 with Colonel Sam Manekshaw of the Indian Army and an air force officer.¹³⁴ The Commander-in-Chief of the Pakistani Army, General Messervy, was in London to buy armaments for the Pakistani army as they did not get their share of arms after the partition. According to Menon, India had plans to send the Indian army into Kashmir by air and road from 24 of October 1947.¹³⁵ Clearly, there should have been joint action on the raiders rather than initiating a fight between India and Pakistan, especially when the army was fighting under the same Supreme Commander, Auchinleck. This demonstrates a lack of responsibility, moral accountability, and preparedness on the part of Britain to protect the national security of the Princely state of Kashmir, which had not acceded to India or Pakistan. It was the legal as well as moral responsibility of Britain to protect the welfare of the Kashmiris.

The Maharaja fled to Jammu on 25 October 1947 and on 26 October 1947 he sent his new Prime Minister, Mahajan (successor of Janak Singh), to Delhi to negotiate for military assistance. India refused help without accession. On 26 October 1947, the Maharaja wrote a letter to Mountbatten acceding to India and signed the IOA, according to Menon, in Jammu.¹³⁶ On the same day, Menon appeared in Jammu and obtained the signatures of the fugitive Maharaja and promised him army assistance to revive his rule in Kashmir.¹³⁷ On 27 October 1947, Mountbatten provisionally accepted the IOA, subject to the conduct of a plebiscite in Kashmir to confirm the Maharaja's choice to join India.¹³⁸ The letters dated 26 October and 27 October 1947, from the Maharaja to Mountbatten and vice versa, form a part of the IOA that the Maharaja signed. The first letter from the Maharaja offers an accession, while the second letter from Mountbatten accepts it. These two letters together constitute an international agreement symbolising the meeting of minds between the parties concerned. Hence the Maharaja's letter, to which the IOA was annexed, cannot stand on its own as self-contained, complete, final, and detached from the Indian Governor-General's letter, which made the accession conditional on a

¹³⁴ Collins and Lapierre, (n 90) 408.

¹³⁵ Menon, (n 125) 383.

¹³⁶ *ibid* 399.

¹³⁷ Baha-ud-Din Farooqi, *Kashmir Cries for Justice* (Institute of Kashmir Studies, Srinagar 1995) 3.

¹³⁸ FO 371/129775: Letter Dated 27 October 1947 from Governor General of India Mountbatten to Maharaja of Kashmir [NAL].

plebiscite.¹³⁹ In one letter there is an *offer* for Kashmir to accede to India, while the other letter shows that the offer was *accepted* on certain terms.¹⁴⁰

Nehru affirmed that a free and fair plebiscite would be held and that it would be binding on India.¹⁴¹ Morris-Jones, Constitutional Advisor to Mountbatten from June–August 1947, commenting on the plebiscite option, was of the view that a referendum in Kashmir was a ‘carefully considered option’ but was not ‘high on the Mountbatten agenda’ in June. By the time Mountbatten put forward the idea in October it was too late as he was no longer Viceroy not in a position to see it through as an integral part of the partition operation.¹⁴²

On 27 October 1947 under the command of Lt Colonel Dewan Ranjit Rai, troops of the First Sikh Battalion were airlifted into Kashmir.¹⁴³ Later Pakistan stepped in to secure the land that the tribesman had conquered. This started the first war between India and Pakistan, in which British officers were in command of the armies at the highest level on both sides.¹⁴⁴ By the end of the war, India had seized some parts of Kashmir, including Srinagar, Ladakh, and Jammu. Pakistan, on the other hand, was able to keep the Western part of Kashmir, which they called Azad Kashmir, with its capital at Muzaffarabad.¹⁴⁵

On 29 September 1947, Abdullah was released from prison and he insisted that:

Accession is of little importance and freedom is more important. We do not want to join either dominion as slaves. I warn the Government of India and Pakistan that if the Maharaja decides to join either of them without our consent we shall raise a revolt against such a decision.¹⁴⁶

139 Christopher Bromhead Birdwood, *India and Pakistan: A Continent Decides* (Praeger 1954) 58–59.

140 Statement of Representative of India Mr G Ayyangar in the SC on 15 January 1948 in K Hasan, (n 59) 140.

141 Telegram from Jawaharlal Nehru, Prime Minister of India to Mr Clement Attlee, Prime Minister of UK dated 26 October 1947 and to Liaquat Ali Khan Prime Minister of Pakistan, 27 October 1947; Menon (n 125) 387.

142 WH Morris-Jones, ‘Thirty-Six Years Later: the Mixed Legacies of Mountbatten’s Transfer of Power’ (1983) Royal Institute of International Affairs, 624, 625.

143 Butler, (n 122) 277.

144 Lamb, (n 106) 3.

145 Thomas M Leonard, *Encyclopedia of the Developing World* (Routledge 2006) 897.

146 H Ram, ‘Why Article 370?’ *Kashmir Times* (7 October 1982) 2.

Later Abdullah was chosen to be the head of the State of Jammu and Kashmir under the title of Chief Emergency Administrator. This emergency government continued to operate under the general supervision of the Prime Minister. In October 1948, Abdullah was made Prime Minister of the Interim Government of Kashmir by India. This started the process of the Indian incorporation of Kashmir. The exact nature of the process through which Kashmir was incorporated by India will be discussed in detail in Chapter 5.

The war resulted in the division and seizure of Kashmir by India and Pakistan, displacing many Kashmiris, including Kashmiri *Pandits*.¹⁴⁷ When it appeared probable to India that a plebiscite would be held under some neutral authority, a campaign of brutality was let loose. As per the Manuscripts and European (Private Papers) held at the British Library, India feared the loss of the territory and reacted by committing massacres, driving the majority of Muslims out of Kashmir.¹⁴⁸ The archived papers suggest that the aim of the Indian army was to ensure that India won the plebiscite. However, when the Indian troops invaded Kashmir on 27 October 1947, it was claimed to be a temporary measure to safeguard democracy and make a fair plebiscite possible in the near future.¹⁴⁹ India justified sending its army to Kashmir by saying that they were assisting the Maharaja to regain control of the territory as it was being attacked by tribesmen.

In the war of 1947, Indian troops supported by aeroplanes attacked villages, killing people in order to stifle their call for a free and fair plebiscite.¹⁵⁰ The tribesmen, meanwhile, looted, plundered, and indiscriminately shot people dead.¹⁵¹ A report from 8 November 1948 kept at the British Library (India Office Records), suggests that the strength of the Indian army in Indian-seized Kashmir was overwhelming, with a 450,000-strong group supplemented by state troops, Nepali troops, and national guards.¹⁵² The Dominion Office records, kept at the National Archives in London, show that in the First Indo-Pakistani War, 400 British officers in Kashmir were fighting on the Pakistani side and 300 were fighting on the Indian side.¹⁵³ Lamb argues that India had

147 Henny Sender, *The Kashmiri Pandits – A Study of Cultural Choice in North India* (OUP 1988) xiv.

148 Mss Eur F164/26: Inside Kashmir 1948 [BL].

149 *ibid.*

150 *ibid.*

151 Lamb, (n 128) 237.

152 IOR: L/WS/1/1205, 1948, Fortnightly Reports: Kashmir [BL].

153 DO 35/3163: Military Situation in Jammu and Kashmir [NAL].

done its homework before invading Kashmir and that Lt. General Dudley Russell personally supervised the associated strategy, with Mountbatten himself lending a hand.¹⁵⁴ Clearly, the tribal invasion from Pakistan only advanced the premeditated Indian plan of invading and seizing Kashmir. Over the years, Kashmir has resisted the Indian seizure and India maintains control by the use of force exercised by its stationed armed forces.¹⁵⁵

The Validity of Kashmir's Accession to India: A Dialectical Legal Analysis

Fitzmaurice's Preliminary Legal Opinion of 25 and 27 February 1948 on the Validity of Kashmir's Accession to India

The question of ascertaining the legal validity of the IOA first came up in a telegram (Washington Telegram no. 862) from the US Secretary of State, South East Asia Department, addressed to the British Foreign Office. The US Secretary of State sought advice (among other things) on the question of 'How far the Security Council would have the right to question the validity of Kashmir's accession to India?'

On 25 February 1948 in response to this question, Sir G Fitzmaurice, a Legal Adviser at the British Foreign Office, noted:

It seems to me that it would be sufficient, and quite valid, for the Security Council to come to the conclusion that the accession of Kashmir to India in the circumstances in which it had taken place was the root, cause and origin of the threat to peace and security which had arisen and still subsists, and that peace and security could not be restored unless this was reopened.... In that case I should say that it was not beyond the powers of the Security Council to decide that the matter must be reopened that the question of Kashmir's accession, whether it be to India or to Pakistan, must be decided on some broader basis than the decision of the Maharaja, however much the Maharaja may, under the Kashmir Constitution, have the right to take such a decision on his own motion.¹⁵⁶ (Emphasis added)

¹⁵⁴ Lamb, (n 128) 235.

¹⁵⁵ Mss Eur C705: A 1947 tragedy of Jammu and Kashmir State: the cleansing of Mirpur 1947 [BL].

¹⁵⁶ FO 371/69710: Foreign Office, Minutes, Mr Fitzmaurice, 'Validity of Kashmir's Accession to India', 25 and 27 February 1948, see the Washington telegram No. 862 from the US Secretary of State, South East Asia Department, to the British Foreign Office, 25 February 1948.

From the above quotation it is clear that Fitzmaurice was of the view that it would be sufficient and legitimate for the Security Council to come to the decision that the accession of Kashmir to India, in the circumstances in which it took place, was a threat to peace and security and that the matter could not be resolved unless the question of Kashmir's accession to India was reopened. He further stated that the question of accession must not rely solely on the will of Maharaja, even if his constitution permitted him to make such decisions. However, Fitzmaurice made it clear that this view was not to be construed as his final opinion because he did not have access to all the documentation required to provide such view. In this connection he stated:

In making the above observations I have not attempted to give any actual opinion on the validity of Kashmir's accession to India. If such an opinion is desired I should have to have all the relevant papers.¹⁵⁷

On 27 February 1948, Fitzmaurice again stated that the validity of Kashmir's accession to India was a difficult issue. However, he postulated his preliminary view based on limited documentation relating to two theories, both of which concluded that the accession of Kashmir to India was *technically* valid. At this point it should be noted that on 26 May 1949 Fitzmaurice provided a revised legal opinion based on new evidence and documentation, in which he annulled his previous opinion and affirmed that the accession of Kashmir to India was *invalid*. This opinion will be discussed in detail in the next section.

As far as Fitzmaurice's 27 February 1948 preliminary opinion is concerned, his first theory took note of Section 6 of GOIA 1935 as amended by the Indian Independence Act 1947, about which he stated:

It would appear if a ruler of an Indian State, *acting of his free will, and not under duress or fraud, makes a declaration of accession*, and that declaration is, in fact, *accepted by the Governor-General* of the Dominion he makes it to, then the accession is *necessarily valid*, its acceptance by the Governor General being apparently conclusive, and irrespective of whether under the constitution of the State concerned the ruler really had the power to make the declaration or observed the necessary internal formalities.¹⁵⁸ (Emphasis added)

¹⁵⁷ *ibid.*

¹⁵⁸ FO 371/69710: Foreign Office, Minutes, Mr Fitzmaurice, 'Validity of Kashmir's Accession to India', 25 and 27 February 1948.

The idea was that if the Maharaja had acceded to India of his free will and if the Governor General had accepted the IOA, the accession would be internationally valid irrespective of whether the Maharaja's constitution permitted him to do so or not. Following this perspective, he inferred that if the Maharaja had made a decision to accede of his own free will then the accession was technically valid under Section 6 of the GOIA. However, as discussed earlier in this chapter, the Maharaja was not only acting under duress from India, including Governor General Mountbatten, but the Governor General had also conditionally and provisionally accepted the IOA. It is therefore clear that the IOA *per se* was not valid for these reasons.

In his second theory Fitzmaurice considered the idea that the Princely States had become independent sovereign states after the paramountcy had lapsed. He stated:

It is therefore a question of one sovereign independent State acceding to another. It is, therefore, I think arguable that the relevant provisions of the Government of India Act, 1935, as modified and preserved by the India Independence Act ... merely lay down the procedure which has to be followed in order that accession may take place, but without affecting one way or another the question of the fundamental validity of the accession.¹⁵⁹

Fitzmaurice stated generally that it must be read into all constitutions that while deciding on the question of independence the *general will* of the people must be consulted. However, on the question of the accession of Kashmir to India, he asserted that the constitutions of all the Indian States were totalitarian and that all the powers, including external affairs, were vested in the ruler. He concluded that the Maharaja of Kashmir was no exception and therefore his accession to India was *technically* valid. As we shall see in the next section, this opinion was of a preliminary nature and was superseded by his revised and final opinion.

*Fitzmaurice's Revised and Final Legal Opinion: Legal Validity of
Kashmir's Accession to India, 26 May 1949*

In 1949, upon the request of the Commonwealth Relations Office (through Noel-Baker, the Representative of the UK at Security Council) Fitzmaurice (still as Legal Advisor to the British Foreign Office) provided his revised opinion

¹⁵⁹ FO 371/69710: Foreign Office, Minutes, Mr Fitzmaurice, 'Validity of Kashmir's Accession to India', 25 and 27 February 1948, see Minutes dated 27 February 1948.

on the validity of the accession of Kashmir to India. In this revised opinion, Fitzmaurice admitted that certain facts had not been known to him when he wrote his preliminary views on 27 February 1948. On the basis of the new evidence, he stated that the accession of Kashmir to India was *invalid*. He articulated this fact in the following words:

I have been asked to give a considered opinion concerning a question on which *I wrote a preliminary opinion last year, namely, the validity of accession to India* purported to be made on behalf of his State by the Maharaja of Kashmir and Jammu in October, 1947. I will not recapitulate the *facts ... but certain of them were not known to me when I wrote my opinion last year, and in view of them I have now come to the conclusion that the accession of Kashmir to India can be regarded as quite invalid unless it could be known (and I do not think it has been) that Pakistan had, by then, committed such violations of her "Standstill Agreement" with Kashmir* that it must be considered to have been brought to an end.¹⁶⁰ (Emphasis Added)

The Attorney-General, Sir Hartley Shawcross, in his letter to Fitzmaurice dated 20 June 1949 agreed with Fitzmaurice's opinion on the three legal contentions, namely:

- (1) ...the Maharaja was *not a free agent* at that time of the accession;
- (2) ...he was *not in proper control of his State* and could not, as he had undertaken to do, ensure that due effect was given to the accession in his State;
- (3) ...the *acceptance was conditional*.¹⁶¹ (Emphasis added)

These legal contentions pointed out by Shawcross also sum up the revised legal opinion of Fitzmaurice on the legal validity of Kashmir's accession to India, the details of which are discussed below.

The Maharaja was Not a Free Agent – The Standstill Agreement and Its Effect on the Recognition of the Accession to India

As discussed in Chapter 2 the Standstill Agreements, subsequent to the lapse of British paramountcy over the Princely States, defined a provisional

¹⁶⁰ F 10914/10125/85; Fitzmaurice's Opinion on Legal Validity of Kashmir's Accession to India, 26 May 1949 appended to 'The Right Hon. P.J. Noel Baker (Commonwealth Relations Office) to Sir Hartley Shawcross (enclosed only)' 3 June 1949, para 1 (Unpublished Source).

¹⁶¹ *ibid.*

administrative arrangement between the Princely States and the new dominions (India and Pakistan). These agreements were intended to maintain the 'existing arrangements' until the issue of accession was resolved.¹⁶² The Maharaja of Kashmir negotiated the Standstill Agreement with Pakistan via telegrams dated 12 and 15 August 1947. Based on this administrative arrangement, the Government of Pakistan operated the post office and telegraphic services in Kashmir.¹⁶³ The Standstill Agreement with Pakistan also contained in its Schedule a list of other subjects including 'External Affairs', according to which all agreements and administrative arrangements that formerly existed between the British Crown and the Indian States were to continue between the relevant Princely State and the new dominion. In this connection Fitzmaurice concluded:

These *Standstill Agreements* ... have generally been interpreted as meaning in the present connection that, during the currency of the Agreement, the *conduct of the foreign relations of the Indian State concerned* ... is placed in the hands of the other party to the Agreement.¹⁶⁴

Arguably the Maharaja of Kashmir, by signing the Standstill Agreement with Pakistan, technically transferred (among other things) the subject of 'External Affairs' to the dominion of Pakistan. Fitzmaurice argued that the Standstill Agreement placed the foreign relations of Kashmir into Pakistan's hands. Therefore, the Maharaja was neither a free agent nor in a position to accede to India, except with the prior consent of Pakistan. Fitzmaurice concluded that:

Now assuming the effect of the Standstill Agreement to have been to place the conduct of the Indian States' foreign relations in the hands of the other Party, it seems clear that no international act during the currency of the Agreement could be performed by the State concerned except with the consent of and, indeed, through the Government of the other Party ... On that basis, it seems clear that, having entered into a Standstill Agreement with Pakistan by which, amongst other things, he placed the conduct of his foreign relations in the hands of the Government of

¹⁶² 'Standstill Agreement with India and Pakistan' in Verinder Grover (ed), *The Story of Kashmir: Yesterday and Today*, Vol. 111 (Deep & Deep Publications 1995) 76.

¹⁶³ Hasan, (n 59) 43.

¹⁶⁴ F 10914/10125/85, (n 160) para 2.

Pakistan, the Maharaja of Kashmir could not validly, during the term of the Agreement, proceed to accede to India, except at any rate through and with the consent of the Government of Pakistan. In my view such an act [Accession] on the part of Maharaja in the circumstances did not constitute simply one of those cases where, although what is done involves a breach of an agreement, it nevertheless remains a legally effective act. *I consider* it to be something, which was actually a *nullity*, because, the Maharaja lacked *capacity* to take such a step as this of his own motion, as long as the Standstill lasted.¹⁶⁵ (Emphasis added)

At this stage it is significant to make a distinction between acts that are *invalid* and those which are *null and void*. An act is *invalid* if it is not legally binding or enforceable. For example, Britain in late 1918 argued that the Sykes-Picot Agreement of 1916¹⁶⁶ – a secret agreement between the governments of the UK and France (with the assent of Imperial Russia) – was *invalid* due to the lapse of the Constantinople Agreement of 1915.¹⁶⁷

On the other hand, an act is *null and void* where ‘it has no legal effect whatsoever, and no rights can be obtained under it or spring from it’. In law, declaring something *null and void* is the equivalent of saying that the thing never existed at all and is a complete nullity. For example, in 1918 the British government came to regard the St. Jean de Maurienne Agreement 1917 (a tripartite agreement between Britain, France and Italy) *null and void* because the stipulated consent of the Russian government had never been obtained.¹⁶⁸ These examples clearly suggest that an act becomes *invalid* subsequent to non-fulfilment and the lapse of certain valid conditions. On the other hand, an act is *null and void* if consent to the act is never obtained, which makes the act in question non-existent.

As is apparent from Fitzmaurice’s legal opinion that on the accession of Kashmir to India the Maharaja, during the enforcement of the Standstill Agreement with Pakistan, was not a free agent able to perform an international act except with the consent of or through the Government of Pakistan. The non-fulfilment of this condition rendered the IOA null and void. In fact, the

¹⁶⁵ *ibid* para 3.

¹⁶⁶ Editors, ‘Sykes-Picot Agreement’ (*Encyclopædia Britannica*, 31 May 2016) <<https://global.britannica.com/event/Sykes-Picot-Agreement>> accessed 10 October 2016.

¹⁶⁷ PC Helmreich, ‘Italy and the Anglo-French Repudiation of the 1917 St. Jean de Maurienne Agreement’ (June 1976) 48(2) *The Journal of Modern History* 99, 102.

¹⁶⁸ *ibid*.

1948 Security Council discussions also supported this view and concluded that the Maharaja was not in a position to sign the IOA with India and be bound by the Standstill Agreement with Pakistan at the same time, as both related to the same subject matter.¹⁶⁹ This technical point was made apparent by Fitzmaurice in his legal opinion, in which he showed that the terms of the IOA (in its Schedule) entrusted 'External Affairs' to India, but that 'External Affairs' were also included in the Standstill Agreement with Pakistan. He argued that:

If both these instruments were valid, an impossible conflict would arise, because there would be two different international entities both of whom would have a more or less exclusive right to conduct Kashmir's relations, and her defence and other matters as well. It seems clear that, of the two, the accession must be the one to go ... the Standstill Agreement was prior in point of time. It was to last for a definite period and there was nothing in it to suggest that it would automatically terminate if Kashmir purported to exercise a faculty, which *ex hypothesi*, in view of the Agreement, she was not in a position to exercise during its currency.¹⁷⁰

As suggested by Fitzmaurice, from a legal point of view, two different entities (namely, India and Pakistan) clearly could not contemporaneously possess an exclusive right to conduct Kashmir's foreign relations and her defence. Arguably, in the absence of any provisions as to the automatic or unilateral termination of the Standstill Agreement, it could not be terminated without prior permission from Pakistan. Obviously, the Standstill Agreement could only be purported to have been terminated in circumstances where unequivocal evidence demonstrated that Pakistan had committed a fundamental violation of the Standstill Agreement. In this connection, Fitzmaurice stated:

In the *absence of any clearly established case against Pakistan* or even of any declaration by Kashmir that she considered *Agreement* to have been terminated by Pakistan's conduct it must necessarily be regarded as having still been *in full force* at the time of Kashmir's *purported accession to India*. Indeed *Maharaja* himself *implicitly recognised* this in the explanatory *letter to the Governor-General of India* accompanying his instrument

169 SCOR, 231st mtg, 22 January 1948, 143–63 at 158.

170 F 10914/10125/85, (n 160) para 4.

of accession ... in which *he* clearly speaks of *the Standstill Agreement as something in effect*.¹⁷¹ (Emphasis added)

Fitzmaurice's analysis shows that even if the IOA was signed it was not valid because of the existence of the Standstill Agreement between Kashmir and Pakistan. The Maharaja himself tacitly documented this in the letter that accompanied his IOA to India.

Fitzmaurice also discussed the possibility that even if the Indian perspective on the signing of the IOA was accepted as valid, the other states in the international community were not bound to recognise such an accession. This was mainly because of the major modifications in the decolonisation plan of British India, which was divided into two states – India and Pakistan – before its independence. Previously, under the statutory regime of GOIA 1935, the accession of the Indian States was treated as more or less a domestic matter, as there was only one party to the accession, i.e. the Indian Federation. Under this previous arrangement, the Princely States were entitled to remain either under the British Crown or to accede to the Indian Federation, therefore there was no option of independence. However, the state of affairs contemplated by GOIA 1935 did not materialise; it was effectively altered due to the division of British India, which was planned under the IIA 1947. Under Section 7 of the IIA 1947, the Princely States ceased to be under the paramountcy of the Crown after the independence of British India and were provided an option to accede to India or Pakistan, or to remain independent. From this factual position Fitzmaurice categorically concluded that:

Although they [the Indian States] had not received any recognition as international entities, their position was nevertheless, for the time being, that of independent States ... the statutory machinery ... became at this stage simply the *means* by which, at the India or Pakistan end of the affairs so to speak, an accession might be *accepted* in a manner valid for purposes of Indian or Pakistan law ... but of course, it would not follow that other States were bound to recognise the accession as good internationally ... States often claim, or incorporate, or annex territories in a manner valid under their own law, without such claim, incorporation or annexation receiving any recognition internationally ... it may ... be treated by other countries as devoid of all legal foundation. For instance

171 *ibid* para 5.

at this moment [1949] the Baltic States are part of the Soviet Union under Russian law, but a great many other countries do not recognise this situation.¹⁷² (Emphasis added)

Fitzmaurice makes it clear that it was not obligatory for the international community to recognise an illegal act of accession as valid even if it could be seen as valid from the Indian point of view or in their own domestic law. Such acts would have no effect internationally on the recognition by other states of Indian title to the territory of Kashmir. It is argued that by comparing the Baltic States with Kashmir, Fitzmaurice not only internationalised the Kashmir question but also accepted the resemblance between the two situations, acknowledging that annexing a territory and incorporating it under the occupier's law did not meet international legal standards nor make it necessary for the international community to recognise such an illegal seizure. For these reasons, the international community was not bound to recognise the accession of Kashmir to India as valid. The discussions on the UN Security Council Resolutions on Kashmir in the later chapters will demonstrate this in detail, making it clear that the international community in fact did not recognise the Indian seizure and incorporation of Kashmir, and instead called for demilitarisation and the conduct of a plebiscite to determine its status.

Finally, Fitzmaurice argued that the earlier conduct and assertions of India in the cases of Hyderabad and Junagadh were difficult to reconcile with their present position in Kashmir. Shawcross, agreeing with Fitzmaurice, stated that:

Although India is not, in point of international law, estopped from asserting a title to Kashmir ... no doubt ... *refusal to recognise India's title* based upon the strictly legal grounds that the *Standstill Agreement with Pakistan had precluded any act of accession* would be considerably *strengthened* if it is supported and reinforced by reference to *India's conduct in the cases of Hyderabad and Junagadh* and the manner in which His Majesty dealt with the representation made by the Nizam.¹⁷³ (Emphasis added)

It is therefore clear that the Maharaja was not a free agent to accede to India without the prior consent of Pakistan. Further, the Maharaja was not in

¹⁷² *ibid* para 7.

¹⁷³ Opinion of the Attorney General, Sir Hartley Shawcross to Mr P.J. Noel-Baker (Commonwealth Relations Office) 20 June 1949 in *ibid*.

sufficient control of his state at the time of accession due to the unstable conditions caused by the uprisings against him and, therefore, he was not in a position (politically speaking) to make the decision on behalf of Kashmir to accede. Furthermore, at a legal level, his already existing Standstill Agreement with Pakistan dispossessed him of the legal capacity to take such actions on behalf of his state. A communication from the British Embassy in Washington to the Foreign Office in London in 1950 discussed the legality of the IOA to India and concluded:

The Standstill Agreement ... was still in force at the time when the Maharaja of Kashmir executed an Instrument of Accession to India in October 1947 ... Kashmir's failure to consult Pakistan in advance of the Maharaja's executing an Instrument of Accession ... constituted ... breach of duty on the part of Kashmir ... the contested Instrument of Accession was not effective to settle definitely the right of the parties ... for these reasons the execution of Instrument of Accession could not finally accomplish the accession of Kashmir to either dominion ... the question of [the] future of Kashmir remained to be settled in some orderly fashion and in relatively stable conditions.¹⁷⁴

The international community, as we shall see in Chapter 6 by looking at Security Council discussions, did not recognise that India had obtained valid title over Kashmir through the accession.

The Acceptance of the Accession of Kashmir to India was Conditional Fitzmaurice, as well as the Attorney-General, Sir Hartley Shawcross, were of the opinion that the acceptance of the Maharaja's decision on behalf of Kashmir to accede through the Governor-General Mountbatten was *conditional*.¹⁷⁵ As the archival documents suggest, the acceptance of the accession by the government of India was not outright in nature but was instead provisional in character. Such acceptance by the Governor-General, as Fitzmaurice shows, was conditional on a 'reference to the people' which was to be conducted after order was restored in Kashmir. The conduct of a plebiscite was standard

¹⁷⁴ FO 371/84244, FL 10112/2: Confidential Letter No 1063/93/50; 11 February 1950 from British Embassy Washington to Foreign Office, London [NAL].

¹⁷⁵ F 10914/10125/85, (n 160).

British policy during decolonisation. Furthermore, the relevant statutes did not provide for conditional acceptance.¹⁷⁶ It is apparent from the given facts that Mountbatten did not accept the accession unconditionally. As Foreign Office Minutes show, Sir Patrick Renison (Commonwealth Relations Office) reinforced this fact to Sir Archibald Carter (at the time, one of the Joint Permanent Under-Secretaries of State for Commonwealth Relations) in the following words:

The Governor General [*Mountbatten*] on behalf of India accepted the accession provisionally subject to it being ascertained after order had been restored if accession to India was the choice of the people of Kashmir.¹⁷⁷ (Emphasis added)

It is therefore argued that the entire question of accession was conditional on the determination of the 'wishes of the people', which the Security Council recognised and reaffirmed in their Resolutions calling for a plebiscite in Kashmir. Since this prerequisite was not fulfilled in periods when stability was restored – the people were never consulted – technically the Maharaja's accession of Kashmir to India was never legitimised and hence rendered *null and void*.

Further, Fitzmaurice noted that spokesmen for the government of India had often issued statements and passed declarations in which they stated that the status of Kashmir's accession was indeterminate and subject to conducting a plebiscite. He argued that these factors:

...disentitle India from objecting if any other Member of the United Nations finds itself unable to admit the validity or finality of Kashmir's accession and prefers to base its attitude on the view that the accession has had no definite effect one way or the other.¹⁷⁸

Fitzmaurice also suggested that India's attitude to Kashmir was diametrically inconsistent with the position it took in the case of Junagadh. Junagadh

¹⁷⁶ F 10914/10125/85, (n 160) Para 10; FO 371/129775: Letter Dated 27 October 1947 from Governor General of India Mountbatten to Maharaja of Kashmir [NAL].

¹⁷⁷ FO 371/69710: Foreign Office, Minutes, Mr Fitzmaurice, 'Validity of Kashmir's Accession to India', 25 and 27 February 1948.

¹⁷⁸ F 10914/10125/85, (n 160) para 13.

had acceded to Pakistan in September 1947. However, India militarily seized Junagadh and then conducted a plebiscite there. India challenged the accession on the ground that most of the population of the State of Junagadh were Hindu though its ruler was a Muslim. The accession of Junagadh to Pakistan was reversed after an overwhelming proportion of the population voted for accession to India. In this connection, Fitzmaurice noted that Junagadh was the:

...exact case of Kashmir, but in reverse, and, in the face of it, India can hardly maintain that the validity of an accession depends solely on an Instrument of Accession having been presented in due form and having been duly accepted, or that an accession, once effected, is final and irreversible.¹⁷⁹

The Indian practice and precedent in Junagadh estopped it from upholding that the validity and finality of accession solely depended on the signing of an instrument of accession by the Maharaja. Arguably, India had accepted the conduct of a plebiscite as a commitment to both Kashmir and the international community.

*Fitzmaurice's Supplementary Legal View of 12 October 1949
in Continuance of His Revised Opinion on the Validity of
Kashmir's Accession to India*

On 12 October 1949, the British Foreign Office requested Fitzmaurice to formulate a further updated legal view in continuation of his revised view of 26 May 1949 on the validity of Kashmir's accession to India. He was also requested to obtain Attorney General Shawcross' view on that opinion.¹⁸⁰ This additional update was requested since the Americans wished to pursue this matter further. The request was to review whether at a legal level, a formal Standstill Agreement between Kashmir and Pakistan could be said to have been entered into based on an exchange of telegrams between said parties.¹⁸¹ On 12 August 1947, the Prime Minister of Kashmir sent a telegram to the States Relations Department of Pakistan saying:

¹⁷⁹ *ibid* para 11.

¹⁸⁰ F 16364/10125/85: Mr G.G. Fitzmaurice to the Attorney-General (H. W Shawcross), 12 October 1949 (Unpublished Source), see, F 13759/10125/85: Telegram from Foreign Office to New York, 24 September 1949 (Unpublished Source).

¹⁸¹ *ibid*.

Jammu and Kashmir Government would welcome *Standstill Agreements* with Pakistan *on all matters on which these exist at present moment with outgoing British Indian Government*. It is suggested that *existing arrangements* should *continue pending settlement* of details and *formal* execution of fresh *agreement*.¹⁸² (Emphasis added)

The Foreign Secretary to the Government of Pakistan replied to the Prime Minister of Jammu and Kashmir in a telegram dated 15 August 1947, expressing that:

The Government of Pakistan agrees to have a *Standstill Agreement* with the Government of Kashmir for the *continuation* of the *existing arrangement* pending settlement of details and *formal* execution of fresh *agreement*.¹⁸³ (Emphasis added).

A clarification was sought on the legal point of whether the Maharaja's accession to India could be valid after he had agreed to the Standstill Agreement with Pakistan, which had placed the conduct of Kashmir's foreign relations in the hands of Pakistan.¹⁸⁴ Fitzmaurice approached this request by looking at four significant matters, namely: (1) the meaning of the terms 'outgoing British Indian Government' and 'existing arrangements' as used in the exchange of telegrams between Kashmir and Pakistan; (2) whether the exchange of telegrams between said parties gave rise to an agreement; (3) whether the resulting agreement covered foreign affairs; and (4) whether the presence of a Standstill Agreement in the form of the exchange of telegrams significantly affected the conclusion that the accession of Kashmir to India was invalid.

In dealing with the first point, Fitzmaurice analysed the relationship that the outgoing British Government had with the Princely States. He found that the Princely States had a significant link to the British Crown rather than the former Government of India. However, he agreed that the Crown's relationship with the Princely States was carried out largely through the machinery of the British Indian Government.¹⁸⁵ Referring to the opinion provided

182 F 16364/10125/85, (n 180).

183 F 14095/10125/85: Repeated UK High Commissioner in India, Washington and UK Delegation, New York, 19 September 1949 in *ibid*.

184 F 10914/10125/85, (n 160).

185 F 16364/10125/85, (n 180).

on 26 September 1949 by an Assistant Legal Advisor to the Commonwealth Relations Office, Mr. Oxley,¹⁸⁶ Fitzmaurice suggested that according to the Treaty of Amritsar (TOA) 1846, the term 'outgoing British Government' meant 'Government of India', because the TOA outlined the relationship between the Government of India and the Princely State of Kashmir. In 1950, the Supreme Court of India adopted a similar approach when looking at the effect of a Standstill Agreement, this one involving the Princely State of Tonk, in *Ram Babu Saksena v The State*.¹⁸⁷

A Standstill Agreement was entered into between the Tonk State and the Indian dominion ... which provided that *all the agreements and treaties* of the Tonk State with the former British Indian Government would *continue to subsist* between the Indian dominion and the State of Tonk.¹⁸⁸ (Emphasis added)

From this statement it is clear that even the Supreme Court of India accepted that the conclusion of the Standstill Agreement between the Princely State and a new dominion sustained the previous agreements and treaties between the Princely States and the former British Indian Government. This decision, therefore, supports the view that TOA 1846 between the British Indian Government and Kashmir continued after the latter's conclusion of the Standstill Agreement with Pakistan.

Fitzmaurice further argued that the term 'existing arrangement' would have covered a whole set of things, 'the transfer of which to Pakistan must have been incompatible with accession by Kashmir to a third country'.¹⁸⁹ Referring to Oxley's opinion, Fitzmaurice agreed that continuing the TOA and the subsequent exchange of telegrams between said parties:

would be to *substitute the Government of Pakistan for the British Government* as regards the exercise of any rights or functions under or deriving from this treaty.¹⁹⁰

186 *ibid.*

187 The Supreme Court of India: AIR (1950) S.C. 155. For the discussion on the issue of the significance of the Standstill Agreement in the case of Princely State of Gwalior see, *R v. Pati Ram and Hallu* (Allahabad High Court: AIR) (1949) All. 90.

188 P Diwan, 'Recent Indian Decisions on Public International Law' (1953) 2 *The International and Comparative Law Quarterly* 459, 464.

189 F 16364/10125/85, (n 180).

190 *ibid.*

He concluded that the 'existing arrangements' therefore meant the administrative understanding that Kashmir had at that time with British India. In practice, the conclusion of the Standstill Agreement with Pakistan guaranteed the continuance of trade, travel, communications (including post and telegraphs) and various other services in Kashmir. It is clear that Pakistan was complying with the arrangements and its flag was fluttering on the Post Office of Kashmir in Srinagar.¹⁹¹ Fitzmaurice argued that there was never any real evidence of any breaches of this arrangement by Pakistan.¹⁹² This further buttresses the argument that the Maharaja was not in a position to unilaterally terminate this agreement and accede to India.

With regards to the second question, Fitzmaurice pointed out that the exchange of telegrams essentially amounted to an actual agreement which the Maharaja, as well as the Government of Pakistan, agreed to as a temporary arrangement pending the execution of a formal agreement. He further suggested that it was possible that the Maharaja could have declined to proceed with the signing of a formal Standstill Agreement or could have acted in a manner that relieved him of the provisional obligations of the Standstill Agreement. Since the Maharaja did not act in such a manner before acceding to India, 'he precluded himself from acceding on his own initiative to India'.¹⁹³ In this connection, Shawcross suggested that the exchange of telegrams between said parties 'do give rise to an agreement as between the two Governments consistently with which Kashmir could not accede to India'.¹⁹⁴ He concluded that although each telegram contemplated an eventual formal agreement, the two telegrams did form an agreement. Oxley's opinion on this issue implied that the exchange of telegrams between said parties constituted an offer and acceptance, which amounted to 'an agreement in international law, just as they would in municipal law'.¹⁹⁵

Responding to the third question, regarding whether the agreement between Kashmir and Pakistan covered foreign affairs, Fitzmaurice argued that the Maharaja's intention to negotiate a Standstill Agreement with both India and Pakistan did not single out the conduct of foreign affairs as being excluded

191 Msgid A Siraj, *Kashmir: Desolation or Peace* (Minerva Press 1997) 42.

192 F 16364/10125/85, (n 180).

193 *ibid*.

194 F 16364/10125/85, (n 180).

195 *ibid* at F 14753/10125/85: A note on an alleged 'Standstill' agreement between Kashmir and Pakistan by Mr Oxley of the Legal Department of the Commonwealth Relations Office (Unpublished Source).

from his offer.¹⁹⁶ In this context Oxley was of the opinion that after the exchange of telegrams, the 'Pakistan Government' had to be substituted by the 'British Government' in the TOA, and therefore Pakistan was to conduct and control Kashmir's foreign affairs under this treaty.¹⁹⁷

In this context it is argued that Fitzmaurice was aware, as is clear from his revised opinion, that the Standstill Agreement was a standard and a technical arrangement that was known to include external affairs. He was correct in his assessment; the standard Standstill Agreement between the new dominions and the Indian States clearly listed external affairs in its schedule along with air communications, arms and equipment, post, and wireless.¹⁹⁸ These subjects were placed in the hands of the dominion with which the Standstill Agreement was concluded. Fitzmaurice argued that the existence of the term 'Standstill Agreement' in the exchange of telegrams was a standard term of art and included foreign affairs. This effectively meant that when Maharaja Hari Singh, who had been educated in the West,¹⁹⁹ invited Pakistan to enter into the Standstill Agreement, he was fully aware of his rights and responsibilities under this agreement. Furthermore, the earlier discussions in this chapter concluded that in light of Document 1931²⁰⁰ and Section 9 of the TOA,²⁰¹ Kashmir was a protectorate of the British Crown and that it was the Government of British India that provided the necessary protection and conducted its foreign affairs.

Regarding the fourth question, Fitzmaurice was of the opinion that the presence of a Standstill Agreement in the form of the exchange of telegrams did not influence the conclusion that the accession of Kashmir to India was invalid. This was mainly because the nature of the Standstill Agreement was such that it covered a 'field of an arrangement' quite apart from foreign affairs, and that it was impossible to have the same agreement with two countries simultaneously. He affirmed:

196 F 16364/10125/85, (n 180).

197 *ibid* at F 14753/10125/85: A note on an alleged 'Standstill' agreement between Kashmir and Pakistan by Mr Oxley of the legal Department of the Commonwealth relations office, Para 9–12 (Unpublished Source).

198 The Standard Standstill Agreement between Dominion and States; M. S Deora and R. Grover (eds) *Documents on Kashmir Problem* (Discovery Publishing House 1991) 39–40.

199 HL Saxena, 'Sheikh Mohammad Abdullah and Kashmir', *Encyclopaedia of Kashmir* (1995) 1–73, 8.

200 See, (n 19).

201 The Treaty of Amritsar, (n 4).

Even if the reference to existing arrangements did not cover foreign affairs, it still remains very difficult to square the accession to India with Kashmir's understanding with Pakistan.²⁰²

Oxley argued that the exchange of telegrams between Kashmir and Pakistan had the effect of accession, which rendered a subsequent accession to India invalid.²⁰³

From the above discussion, it appears that the presence of the Standstill Agreement between Kashmir and Pakistan in the form of an exchange of telegrams was not a conclusive factor in Fitzmaurice's (revised) legal opinion that Kashmir's accession to India was not only *invalid* but a nullity. However, the implications of the Standstill Agreement remain key points of law that buttress the overall case that the IOA was not valid.

Other Factors Affecting the Validity of the Instrument of Accession
Congress's Coercive Political Lobbying Forcing the Maharaja to
Accede to India

As discussed in the earlier sections of this chapter, the process of 'intimidation and compulsion' by Congress was already in progress prior to the accession of Kashmir to India.²⁰⁴ Nehru clearly had a strong desire to keep Kashmir in India.²⁰⁵ The unequivocal evidence emanating from the archival documents suggests, among other things, that: Mountbatten's support for Congress was partly based on his longstanding friendship with Nehru; Mountbatten took the 'Comprehensive Note' from Nehru to the Maharaja, in which Nehru warned the latter not to accede to Pakistan; Mountbatten ignored the advice of his Political Advisor, Sir Conrad Corfield;²⁰⁶ and the Radcliffe Commission committed irregularities during partition and granted the Muslim majority area of Gurdaspur to India, which later became India's land route to Kashmir.²⁰⁷ These

202 F 16364/10125/85, (n 180).

203 *ibid* at F 14753/10125/85: A note on an alleged 'Standstill' agreement between Kashmir and Pakistan by Mr Oxley of the legal Department of the Commonwealth relations office, para 14 (Unpublished Source).

204 See, Section 4.3 of this chapter.

205 Corfield, (n 108) 531.

206 *ibid* 531; Choudhry, (n 55) 206.

207 MB1/D30/7, (n 115), at 28; Letter of Mr Krishna Menon to Rear-Admiral Viscount Mountbatten of Burma (Extract), Mountbatten Papers, Demi-official Correspondence Files: VK Krishna Menon, 47 Strand, London, W.C.2, 18 July 1947 in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO 1983) 255–56.

statements are also reinforced by the recorded conversation on 18 December 1994 in Delhi between Prem Shankar Jha, who was an Indian UN Representative, and Field Marshal Sam Manekshaw, who was one of the two Indian officers (the other being the Wing Commander Dewan) accompanying Menon to Srinagar on 25 October 1947²⁰⁸ to acquire the signed IOA from the Maharaja. According to Manekshaw, the IOA was signed under duress and coercion. In his interview with Jha, he stated:

I was in the palace when Menon, Mahajan and the Maharaja were discussing the subject. *Maharaja was running from one to another ... I did not see him signing it ...* all I know is that Menon turned around and said, Sam we've got the accession ... all that I can say is that the *Maharaja was ... not in his full senses*. He was running about saying I will fight there ... that sort of rubbish was going on.²⁰⁹ (Emphasis added)

This is compelling evidence that the Maharaja may have been coerced to accede to India and that perhaps Menon, who was acting for India, verbally compelled the Maharaja to sign the IOA.

International law is based on the consent of states and a treaty is one of the most binding forms through which a state can express its consent. For this reason, it is customary under international law that a treaty between two sovereign states is invalid where either party signed under duress. It is established that coercion and duress vitiate a treaty,²¹⁰ and that is now an accepted instance for invalidation under the Vienna Convention on the Law of Treaties 1969. In 1935, a faculty from Harvard Law School prepared a draft document containing conventions for codification under international law.²¹¹ Part III of that research report was the draft of the Law of Treaties and in draft Article 32 duress was listed as a factor that could lead to coerced treaties. An example can be found in a French scholar's intensive review of the Korea-Japan Agreement of 17 November 1905, where the research suggested that the coercion exercised over the Korean representatives by the militant Japanese Empire made the agreement

208 PS Jha, *Kashmir, 1947, Rival Versions of History* (OUP 1996) 63.

209 Statement by Field Marshal Sam Manekshaw, recorded by PS Jha on 18 December 1994, in *ibid* 136–37; PS Jha, *The Origins of Dispute – Kashmir 1947* (OUP 2003) 186–91.

210 E Maxey, 'Treaties as Sources of International Law' (1906) 11 *The Virginia Law Register* 863, 863.

211 'Article 32, Duress' (1935) 29 *American Journal of International Law* (Supplement: Research in International Law) 1148, 1157.

null and void.²¹² Furthermore, writers on international law like Grotius and Vattel appear to be unanimous in their opinion that freely given consent by the parties is an essential condition for the validity of a treaty.²¹³ Grotius maintained that the law of nature required the observance of the principle of equality in the making of treaties, and that there ought to be freedom of choice for the parties.²¹⁴ In other words, treaties are invalid if the consent was acquired by force or fear.

The factual history surrounding the signing of the IOA suggested that it was acquired in a coercive and oppressive manner. These historical circumstances suggest that the Maharaja was neither a free agent, nor did he provide 'free consent', as was required under the statutory regime of the GOIA (Section 6) and under international law. It is precisely these circumstances evidencing duress that rendered the IOA invalid and a nullity. Furthermore, it is significant to clarify that the British government had no similar policy to bully or pressurise the Princely States to accede to the dominion of India or Pakistan. To this effect, on 25 July 1947 Prime Minister Attlee, during a Parliamentary debate, addressed the issue of whether the Princes would be pressurised to accede against their will. He stated, 'I do not think it would be wise for me to add anything to what I said in the Second Reading, which was to the effect that we did not want to bring pressure either way'.²¹⁵ Likewise, on 16 July 1947 Lord Listowel, Secretary of State for India, said in the House of Lords that His Majesty's government would not use the 'slightest pressure' to influence the Princes' decisions.²¹⁶

Clearly, this historical background suggests that Nehru, who was the head of the Congress party, and his supporter, Mountbatten, put in place a strategy of intimidation and compulsion to force the Maharaja to accede to India. Not only did Mountbatten act against British policy, but he also visited Kashmir in the capacity of a Viceroy without his Political Advisor, Conrad Corfield, and

212 F Rey, 'La Situation Internationale de la Corée' (1906) 13 *Revue Générale de Droit International Public* 55; K Young-Koo, 'The Validity of Some Coerced Treaties in the Early 20th Century: A Reconsideration of the Japanese Annexation of Korea in Legal Perspective' (2002) 33 *Korea Observer* 637–67. Also see, generally, A. Carty, 'The Japanese Seizure of Korea from the Perspective of the United Kingdom National Archives, 1904–1910' (2005) 10 *Asian Yearbook of International Law* 3.

213 'Article 32, Duress' (n 211).

214 Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres* (FW Kelsey tr, Clarendon Press 1925) vol II Ch XII, 348 <<http://www.archive.org/details/dejurebelliacpac013020mbp>> accessed 10 October 2016.

215 Parliamentary Debate (Hansard), *HCOR*, 14 July 1947–25 July 1947, Vol. 440, Column 112.

216 House of Lords, Official Reports and 150 HL Debates. 55, c 812.

consistently ignored Corfield's advice. Clearly, Mountbatten was without doubt responsible for intolerable blackmail²¹⁷ and was acting against British policy. All this coercion renders the accession of Kashmir to India null and void.

*Varying Accounts Leading up to the Signing of the Instrument
of Accession*

The varying and controversial accounts leading up to the signing of the IOA also affected its validity. The official description of events does not correspond with the individual accounts of the people involved in the signing of the IOA in 1947. Firstly, there is disagreement as to the date on which the IOA was signed and secondly, there is also controversy in relation to the date on which troops were airlifted into Kashmir. The actual IOA, which is on the website of the Indian Home Ministry, is dated 26 October 1947. Prem Shankar Jha, an Indian UN Representative, maintains that the IOA was signed on 25 October in Srinagar.²¹⁸ However, Lamb claims that Menon was still in Delhi on 26 October 1947 and that he was told that he couldn't fly to Jammu, as there were no night landing facilities in Jammu airport. Hence, Lamb asserts that Menon reached Jammu on 27 October 1947.²¹⁹ Widmalm took it a step further and suggested that the IOA was never signed by the Maharaja, but was forged afterwards.²²⁰

In relation to the airlifting of Indian troops into Kashmir, the government of India's first official explanation suggests that:

On 25th [October] the Government of India directed the preparation of plans for sending troops to Kashmir by air and road. Indian troops were sent to Kashmir by air on the 27th following the signing of the Instrument of Accession the previous night.²²¹ (Emphasis added)

According to Wolpert, Lord Mountbatten and Nehru agreed to order Indian aircrafts carrying the first Sikh battalion from New Delhi to Kashmir subsequent

217 Mountbatten was involved in the similar blackmail in Hyderabad. See the comments of Sir Walter Monckton (British Politician), Ismay (Viceroy's Chief of Staff) and Abell (Private Secretary to the Viceroy) in P Ziegler, *Mountbatten, Official Biography* (William Collins & Sons 1985) 412.

218 Jha, (n 208) 63.

219 Lamb, (n 106) 96.

220 Sten Widmalm, *Democracy and Violent Separatism in India – Kashmir in a Comparative Perspective* (Uppsala University 1997) 50.

221 *White Paper on Jammu and Kashmir*, March 1948, quoted in Lamb, (n 106) 99.

to Maharaja Hari Singh signing the document ceding Kashmir to India.²²² However, according to Manekshaw's interview with Jha, troops started to fly into Kashmir on 26 October 1947.²²³ As per Leonard, on 22 October 1947 tribesmen invaded to seize the territory for Pakistan; however, Indian troops had infiltrated Kashmir prior to this date.²²⁴ These diverse dates given for the signing of the IOA and the airlifting of Indian troops into Kashmir are rather alarming as this seems to suggest that the Indian army may have landed in Kashmir before the Maharaja acceded to India.²²⁵

This controversy is amplified due to the fact that the original IOA remains missing from the archives. However, interestingly, a hand-corrected electronic version of this document is available on the Indian Home Ministry's website, which gives us a glimpse of the supposedly original document, while the original still remains missing.²²⁶ The Dominion Office document on the 'Legal validity of Accession of Kashmir to India' from the British National Archives was lost while on loan to a government department in 1949.²²⁷ Interestingly, the archival catalogues show that negotiations over the issue of accession between the Government of British India and the Government of Kashmir also took place during 1936²²⁸ and 1937.²²⁹ However, these documents also remain missing from the Government of Jammu and Kashmir Directorate of Archives

222 Stanley Wolpert, *India* (University of California Press 1991) 234.

223 Jha, (n 208) 137.

224 Leonard, (n 145), 897.

225 Lamb, (n 106) 338.

226 Ministry of Home Affairs-Government of India – Internal Security – Jammu and Kashmir. <<http://mha.nic.in/accdoc.htm>> accessed 15 January 2016.

227 DO: 142/527: Legal Validity of Accession of Kashmir to India, 1949 [NAL].

228 File No: 70/GI-26, Subject: Question of the Accession of Jammu and Kashmir State to Federation and discussion by the Ministers of His Highness' Government of questions arising there from. 1936; File No: 70/GI-24, Subject: Federal Negotiations with Indian States and visit of Mr F.V. Wylie, special representative of His Excellency the Viceroy, to Jammu in connection with the draft Instrument of Accession, 1936; File No: 70/GI-18, Subject: Opinions concerning the Instrument of Accession (Clause 6 of the Bill), 1936; File No: 70/GI-16, Subject: Consideration of the draft instrument of accession by the Standing Committee of the Chamber of Princes in a meeting at Bombay in 1936; in Index No: 1051: His Highness Government, Jammu and Kashmir, Chief Secretariat, General Records, Index of Records, Volume v (A to F), Political Department Group – Records, From 1922 A.D. to 1940 A.D. [JKA (J)].

229 File No: 338/M-48, Subject: Letter from the Prime Minister to the Resident in Kashmir regarding Federation and the draft instrument of Accession 1937 in Index No: 1051: His Highness Government, Jammu and Kashmir, Chief Secretariat, General Records, Index of

in Indian Occupied Kashmir.²³⁰ Obviously, the missing correspondence relating to accession are crucial for understanding the reasons why despite discussions since 1936, the Maharaja and his Council of Ministers did not accede to India under the statutory regime of GOIA 1935 (Pakistan did not exist at that time). These missing archival documents relating to accession create genuine uncertainty as to the validity of the IOA, the sole base on which the Indian claim rests.

Further, the IOA was conditional on a 'reference to people' and the non-observance of this guarantee made the IOA invalid. Moreover, the IOA contains certain assurances. The significant provisions of the IOA affirm:

I accept the matters specified in the schedule [i.e. defence, external affairs, & communications] ... as the matters with respect to which the Dominion Legislature [India] may make law for this State ... I hereby declare that I accede to the Dominion of India on the *assurance* that ... *any functions in relation to the administration* in this State or any law of the Dominion Legislature [India] *shall be exercised by the Ruler* of the State [Maharaja of Kashmir] ... The terms of ... *my Instrument of Accession shall not be varied by any amendment of the Act* or the Indian Independence Act, 1947 ... *Nothing in this Instrument shall empower the Dominion Legislature* [India] *to make any law for this State* [Kashmir] *authorizing the compulsory acquisition of land* for any purpose ... *Nothing* in this *Instrument* shall be deemed to *commit* in any way to *acceptance* of any future *constitution of India* ... *Nothing* in this *Instrument* affects the *continuance* of my [Maharaja's] *Sovereignty* in and over this *State* [Kashmir].²³¹ (Emphasis added)

The stipulations in the IOA make it clear that if the Maharaja signed the IOA he did so on the basis of certain guarantees and special considerations from the Indian government. However, none of these assurances were fulfilled by India. On the contrary, India started the process of incorporating Kashmir, which was conducted in violation of the provisions of the IOA. This aspect of incorporation will be discussed in detail in Chapter 5.

Records, Volume v (A to F), Political Department Group – Records, From 1922 A.D. to 1940 A. D [JKA (J)].

230 Fozia Nazir Lone, 'Information Held Prisoner: Freedom of Information & Public Records Act' (2007) 2(4) Kashmir Affairs 62, 69.

231 (n 74) paras 3–8.

*The Illegal Seizure and State Continuity of Kashmir: Legal
Evaluation within International Law*

The First Kashmir War of October 1947–1948, which resulted in the seizure and division of Kashmir by India and Pakistan, cannot be attributed to a single factor. It is directly and indirectly linked to the partition of British India, the irregularities that occurred during the last months of the Mountbatten Viceroyalty, and the circumstances that surrounded the actual signing of the IOA. All these factors resulted in the eruption of the crisis in Kashmir in 1947 that continues today. The evidence cited in the previous sections shows that the IOA was induced through coercion and aggression, including the decision to allow the airlifting of the Indian army into Kashmir. In this context, the IOA can be compared to the Treaty of Mutual Assistance, which was the result of Soviet pressure on the Baltic republics, and which allowed it to maintain military and naval bases throughout the Baltic States.²³²

India did not and could not have any historical claim over the territory of Kashmir for the simple reason that there was no State of India prior to 1947. On the contrary, Kashmir existed as a State for one hundred years before India came into existence. Therefore, Kashmir was not and could not have been a part of the non-existent State of India; nor was the newly created State of India in a position to claim such a right through British paramountcy, as it was not transferable and had lapsed. India seized Kashmir through aggression and without a valid IOA in 1947, using 450,000²³³ troops. Over the years, the number of troops has risen to 700,000.²³⁴ The use of military force to capture a territory after UN Charter 1945 came into effect, in the absence of a valid IOA, amounted to an act of aggression against the sovereignty of Kashmir. There is no doubt that aggression is contrary to international law,²³⁵ in view of Article 2(4) of the UN Charter.²³⁶

232 Visuvanathan Rudrakumaran, 'The Legitimacy of Lithuania's Claim for Secession' (1992) 10 Boston University International Law, (n 152) 33, 35.

233 IOR: L/WS/1/1205, 1948, Fortnightly Reports: Kashmir [BL].

234 Rebecca Knuth, *Burning Books and Leaving Libraries-Extremist Violence and Cultural Destruction* (Praeger 2006) 77; Paul R Dettman, *Indian Changes Course-Golden Jubilee to Millennium* (Praeger 2001) 127; Observer News Service, 'Would you need 700,000 troops For 250 militants: Mirwaiz to Go!' *Kashmir Observer* (Srinagar, 31 May 2016) <<https://kashmirobserver.net/2016/local-news/would-you-need-700000-troops-250-militantsmirwaiz-goi-7027>> accessed 10 October 2016.

235 Antonio Cassese, 'On Some Problematical Aspects of the Crime of Aggression' (2007) 20 *Leiden Journal of International Law* 841, 845.

236 ILC, Summary record of the 94th mtg, Question of defining aggression Document A/CN.4/SR.94, Page 98, Para 95 (Extract from the Yearbook of the International Law Commission, Vol. 1, 1951).

The statement to the Security Council from the head of the Indian delegation, Menon, on 8 February 1957, justified Indian invasion of Kashmir in the following words:

One reason why *India's forces entered the disputed territory* [Kashmir] *was to protect a neighbouring area which has been invaded ... in the history of the past 100 years it was a fact that a power which ruled India had always gone to the protection of the Indian Princely State when they were in trouble ... it is true we used force in Kashmir but against whom did we use force?*²³⁷ (Emphasis added)

This statement shows that aggression was used by India. Menon was aware that, prior to the seizure of Kashmir, assistance was to be provided by the government of British India to Kashmir under the terms of the Treaty of Amritsar (TOA) 1846 and not by India, as the latter did not exist as a State at that time but was a British colony. After the creation of two dominions – India and Pakistan, it was declared that India would be a successor State to British India²³⁸ and that Pakistan was given the status of a newly independent country.²³⁹ India also retained the original membership of British India in the UN and all specialised agencies.²⁴⁰ However, as discussed earlier, paramountcy was not transferable. Therefore, no rights and obligations emanating from the TOA could have been reassigned to India after its independence. Erroneously, India, after its independence in 1947, began to act like British India by acquiring an imperialist mentality. This is reflected in the Indian annexation of Junagadh, Hyderabad, Kashmir, and Goa. It is worth mentioning that the Indian delegate to the Security Council, C.S. Jha, after the annexation of Goa, insisted²⁴¹ that:

This is a *matter of faith with us ... whatever anyone else may think Charter or no Charter, Council or no Council* that is our basic faith, which *we cannot afford to give up at any cost.*²⁴² (Emphasis added)

237 FO371/129769: DY1041/107: From India House London, Speech by Krishna Menon, 11 February 1957 [NAL].

238 VP Menon, *Transfer of Power in India* (Orient Longman 1997) 406.

239 JN Dixit *India-Pakistan in War and Peace* (Routledge 2002) 365.

240 PM Eisemann and M Koskenniemi, *La Secession d'Etats: la Codification à l'épreuve des faits /State Succession: Codification Tested against the Facts* (Martinus Nijhoff Publishers 2000) 206.

241 SC, 987th Mtg, Para. 41–43, 60–62.

242 UN SCOR, 16th Sess., 987th mtg., at 9, U.N. Doc. S/PV. 987 (1961), 40.

Goa was a Non-Self-Governing Territory and therefore had special protection guaranteed by the United Nations. Despite that, India annexed Goa and justified it on the basis of subjective reasoning, namely the 'faith' that this territory belonged to it. This statement also demonstrated India's defiance against international law and the Charter principles of non-intervention, respecting sovereignty and territorial integrity.

As discussed in Chapter 3, within international law there is a strong presumption in favour of the continuity of statehood destroyed through belligerent occupation. Hence, belligerent occupation does not *per se* lead to the extinction of the international personality of a state.²⁴³ The discussions in this chapter make it apparent that Kashmir was a state, both on the basis of archival documents as well as from British official policy and statements. For instance, Mountbatten, in deliberations prior to the airlifting of troops into Kashmir stated: 'It would be quite improper to move Indian troops into what is at the moment an independent country'.²⁴⁴ This British hesitation towards airlifting troops into Kashmir suggests that India violated the territorial integrity of Kashmir as their claim was on the basis of the invalid IOA, which the Legal Advisor to British Foreign Office, Fitzmaurice, classified as a nullity. Additionally, the subsequent annexation was clearly unlawful even under the IOA as the conditions of acceptance, i.e. the pledge to conduct a plebiscite, was not fulfilled. The Kashmiri population was therefore suppressed, and their claims for the fulfilment of their right to self-determination were violated. UN Security Council Resolutions have shown that it does not recognise the Indian seizure of the territory of Kashmir. Instead, the UN has repeatedly called for demilitarisation and the conduct of a plebiscite in Kashmir to decide its future.²⁴⁵ These Security Council Resolutions on Kashmir and the international community's reaction will be discussed in some detail in Chapter 6. Furthermore, the Indian military assistance that was provided under the cover of the invalid, unlawful, and conditional IOA was seen internationally as a 'provocative mistake'. The UK High Commissioner to the Commonwealth Relations Office, in relation to the signing of the IOA, stated that the Indian government had made a dangerous and provocative mistake by accepting, even provisionally, the accession of Kashmir to India. 'There was no need to do this. Military help could certainly

243 Krystyna Marek, *Identity and Continuity of States in Public International Law* (2nd edn, Librairie E. Droz 1968) 73–125.

244 Lord Listowel telegram to the Mountbatten on 2 August 1947 in Hodson, (n 51) 399.

245 SCR. 47, 21 April 1948; SC, UNCIP Res. 13 August 1948; & SC, UNCIP Res. 5 January 1949.

have been sent ... without accession of the State'.²⁴⁶ These facts clearly demonstrate that the Indian annexation of Kashmir was illegal, and that military assistance could have been provided without the need for accession. Arguably, the illegal occupation of Kashmir allows it to restore its 'identity without continuity' in the international arena, using the principle of postliminium.²⁴⁷ The illegal Indian seizure has, as such, not destroyed the identity of Kashmir, but its state continuity has been put in abeyance by virtue of the principle of postliminium. Kashmir after seizure may have seemed de facto extinct as a state, but internationally its status could be revived soon after its people are allowed to exercise their self-determination and decide whether to revive its historical title. Arguably, the contemporary divided Kashmir would thereafter be perceived as a continuation of the Princely State of Kashmir, as it was prior to 1947. The chances of a revival of state continuity are amplified for Kashmir, as the people have kept their claim alive over the last 69 years through 'mental continuity'. The facts suggest that from 1947 until the present day, the Kashmiri population has shown resistance to both Indian and Pakistani rule and the use of armed forces. As noted elsewhere, this book focusses on the Indian claim because Pakistan has not claimed legal title to Kashmir.

India has never been able to rule Kashmir peacefully. Clearly, this shows that Kashmir is a 'living mental-political unity of the people in the sense of a national consciousness'.²⁴⁸ Further, apart from showing resistance to the use of force, Kashmiris have also kept their 'mental-political unity' alive in their identity of Kashmiriyat. As Verdross argues, the continuity of statehood is linked to continuity of the people²⁴⁹ and therefore it is the people of the extinct state that keep their state alive. The same is true for Kashmir. For instance, the Baltic States' resistance to the Soviet occupation was a key factor in their survival as a state after 51 years of occupation. The Estonian, Latvian, and Lithuanian partisans engaged in guerrilla warfare through the Forest Brother movement²⁵⁰ to resist the Soviet occupation.

246 IOR L/P&S/13/1845b: Personal telegram to Ismay, care of the UK High Commissioner in India. 31 October 1947 [BL].

247 Quoted in Lauri Mäliksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law* (Martinus Nijhoff 2003) 19–20.

248 *ibid* 34.

249 Quoted in *ibid* 33–34.

250 M Laar, *War in the Woods: Estonia's Struggle for Survival, 1944–1956* (Tiina Ets tr, The Compass Press 1992); <http://en.wikipedia.org/wiki/Forest_Brothers>.

In Kashmir, the people have kept their de facto extinct nation alive for the past 69 years. It is worth mentioning that the Princely State of Hyderabad,²⁵¹ which also lost its statehood after annexation, has lost its claim for the restoration of historical title. A key reason for this is because its people did not keep their state continuity alive through 'mental political unity' or resistance. It is argued that Hyderabad's acquiescence to occupation (not showing resistance) is what lost their claim to state continuity and, hence, the restoration of historical title. In other words, the people of Hyderabad relinquished their claim to the restoration of historical title by surrendering to Indian aggression. India also annexed Junagadh despite the fact that its ruler acceded to Pakistan. However, the question of restoring historical title did not arise because after annexation, a referendum was held on 20 February 1948 and the people chose to remain a part of India.²⁵² Needless to say, such a referendum was conducted in the absence of any constructive proposal from Pakistan,²⁵³ to which Junagadh's ruler had acceded. However, it should still be noted that it was not unusual to hold referendums in the Princely States to ascertain their wishes. In fact it was British policy to do so.

The illegal occupation may appear to be legitimised due to the lack of international reaction. However, the lack of international reaction only delays the restoration of historical title; it does not extinguish such title, as seen in the case of the Baltic States. Further, a lack of reaction is only a delay in sanctions; it does not legalise illegal occupation. In instances where there are calls for the restoration of historical title, like in the Baltic States and Kashmir, the international community has responded and reacted by non-recognition of illegal occupation. The international community does not recognise the territorial changes effected by the use of force as in East Timor.²⁵⁴ Likewise, the US has a policy called Stimson's Doctrine for not recognising international territorial changes achieved through the use of force.²⁵⁵ In the ICJ Advisory Opinion on Namibia in 1971,²⁵⁶ the Court supported the view that the

251 Eagleton, (n 38) 302.

252 LP Sen, *Slender was the Threat: Kashmir Confrontation 1947-48* (Orient Longman 1969) 10.

253 *ibid.*

254 Thomas D Grant, 'East Timor, the UN System and Enforcing Non-recognition in International Law' (2000) 33 *Vanderbilt Journal of Transnational Law* 273, 273.

255 Richard N Current, 'The Stimson Doctrine and the Hoover Doctrine' (1954) 59 *The American Historical Review* 513, 523.

256 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion, ICJ Reports 1971, 54 & 56, paras 118 & 126.

international community could not recognise South Africa's continued presence in Namibia as legal and valid. In the Case Concerning East Timor in 1995,²⁵⁷ the ICJ maintained that the recognition of the territorial changes effected since 1975 by Indonesia on the island of Timor were a delict.²⁵⁸ It is therefore apparent that illegal occupation cannot by itself be recognised as valid, and in the cases where there is the eventual restoration of historical title, the illegality of the occupation becomes a key factor for claiming state continuity through the exercise of the right to self-determination.

From the foregoing discussion it is clear that Kashmir, just as the Baltic States, is entitled to restore its historical title by exercising external self-determination, which is still on offer and protected by the Security Council Resolutions. As discussed in earlier sections, India has, in various official statements, bound herself to conducting a plebiscite. India previously also officially maintained its international position that the accession of Jammu and Kashmir was subject to a decision of the people.²⁵⁹ It is argued that the claim to the territory²⁶⁰ will allow Kashmir to restore its historical title effectively. This claim becomes even stronger if we consider that India unlawfully incorporated Kashmir into its union.

Kashmir's Entitlement to Exercise Self-determination: The Decolonisation Perspective

The general customary law approach finds its roots in Article 38(1) of the Statute of the International Court of Justice²⁶¹ and has two components.²⁶² The first requirement for the establishment of a customary rule in international law is the existence of 'state practice'; the other is a 'subjective element' or the 'psychological element' in relation to that conduct. 'State practice' is an essential element in the formation of the custom and is accepted as helping to form the law.²⁶³ Therefore, in order to answer the question of whether Kashmir

²⁵⁷ *Case Concerning East Timor (Portugal v. Australia)* ICJ, General List No. 84, 30 June 1995.

²⁵⁸ Grant, (n 254) 304.

²⁵⁹ Christopher Bromhead Birdwood, *Two Nations and Kashmir* (Robert Hale 1956) 178.

²⁶⁰ Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 *Yale Journal of International Law* 177, 201.

²⁶¹ Article 38 (1) (b) of the Statute of the ICJ 1945.

²⁶² Maurice Mendelson, 'The Subjective element in Customary International Law' (1995) 66 *British Yearbook of International Law* 177, 177.

²⁶³ Bin Cheng, 'United Nations Resolutions on Outer Space: "Instant" International Customary Law?' (1965) 5 *Indian Journal of International Law* 23.

was entitled to exercise its right to self-determination through a plebiscite upon British Indian decolonisation, it is significant to review British policy on the right to self-determination. Such an understanding, particularly with regard to Non-Self-Governing Territories and decolonisation in the Indian sub-continent, is essential. This discussion in relation to Kashmir is rather unusual since Kashmir was not a proper colony, but rather an abandoned non-European entity that was annexed by the neighbouring States of India and Pakistan. Obviously, the question also arises as to whether the UK should have proposed adding Kashmir to the UN List of NSGTs and what difference, if any, it would have made.

British State Practice and the Right to Self-determination towards the End of the Empire

The State practice of the UK and their foreign policy on self-determination can be traced as far back as 1918. The UK Prime Minister, Lloyd George, confirmed that one of the reasons for the UK participating in WWI was the 'principle of self-determination' and that future territorial questions should be resolved by respecting 'the consent of the governed'.²⁶⁴ The signing of the Atlantic Charter in 1941 and the ratification of the UN Charter in 1945, which includes the references to self-determination, reiterate such reasoning.²⁶⁵

The policy of the UK on 'political' self-determination during the end of the empire is also significant especially in British India, which was ruled through viceroys as a separate empire.²⁶⁶ For the British Empire, the commitment to self-government was shown partly through legislation, like the Colonial Laws Validity Act 1865, British Settlements Act 1887 (and 1945), Colonial Boundaries Act 1985, and the Statute of Westminster Act 1931. All these acts conferred 'self-government' – only a step short of independence – on former dependent dominions.

As discussed in Chapter 1, the position of British India within the British Empire was quite a special and anomalous one.²⁶⁷ It was not classed as a

²⁶⁴ Address of PM Lloyd George to the Trade Union Conference, 5 January 1918, reported in *The New York Times Current History* (New York) 270, quoted in Robert McCorquodale, 'Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-determination' (1995) 66 *British Yearbook of International Law* 283, 284.

²⁶⁵ United States, *Department of State Bulletin* 16 August 1941, 125 and see Articles 1(2), 55 and 73 of the UN Charter 1945.

²⁶⁶ JAS Grenville, *A History of the World from the 20th to the 21st Century* (Routledge 2005) 36.

²⁶⁷ KG Bühler, *State Succession and Membership in International Organisations: Legal Theories Versus Political Pragmatism* (Kluwer Law International 2001) 42.

dominion²⁶⁸ or a colony; it was just a 'part of Her Majesty's dominions'. A major part of the Indian subcontinent consisted of countless Indian States, which were under British suzerainty.²⁶⁹ These States did not form a part of British India. The Indian Secretary, Edwin Montagu, made a declaration in 1917 that the goal of British policy in India was to achieve the 'progressive realisation of responsible government'.²⁷⁰ Up to 1917, 'self-government' was only associated with white colonies.²⁷¹

The Statute of Westminster Act 1931²⁷² did not class India as a 'dominion'. India did not possess full self-governing dominion status.²⁷³ It was only after the start of the struggle for independence in British India that a statutory regime, the Government of India Act in 1935, was created to hand over control in stages.²⁷⁴ Finally, the IIA 1947 was drafted. It provided British India status as a dominion, and also resulted in the creation of a new dominion.²⁷⁵ In fact, India and Pakistan both acquired the status of a dominion (leaving behind their colonial status) when they became a part of the Commonwealth. For the first time, non-British and non-European peoples were to contribute as equals to discussions, and this went far in determining the character of the policies relating to individual Commonwealth governments.²⁷⁶

By the time British India was decolonised, there was a growing body of law on decolonisation within the UK. The UK accepted the obligation placed on it as an administering power to provide information on the Non-Self-Governing Territories (NSGT) administered by it, develop self-government, and take account of the political aspirations of the people in the NSGTs.²⁷⁷ In cases where there were disputes within the colonies, the UK held plebiscites to determine the will of the people concerned. For instance, in 1956, a plebiscite was held

268 HL/PO/PU/1/1931/22&23G5c4: Statute of Westminster Act, c. 4 1931, Section 1 [HLRO].

269 Fifield, 'New States in the Indian Realm' (1952) 44 *American Journal of International Law* 450, 453.

270 *Parliamentary Debates* (Commons), Third Series, Vol. xcv Co, 105 (1917).

271 John Darwin, 'A Third British Empire? The Dominion Idea in Imperial Politics' in JM Brown, WR Louis, AM Low, NP Canny and PJ Marshall (eds), *The History of the British Empire* (OUP 1999) 64, 78.

272 (n 268) Sections 1 & 2.

273 Ayesha Jalal, 'Review: Endgames of Empire: Studies of Britain's Indian Problem by R.J. Moore' (1990) 49 *The Journal of Asian Studies* 427, 427.

274 RJ Moore, 'India in the 1940s' in WR Louis, R Winks, R Louis and A Low (eds), *The Oxford History of the British Empire* (OUP 1999) 231, 233.

275 Nicholas Mansergh, *Survey of British Commonwealth Affairs* (Routledge 1968) 233.

276 *ibid* 249.

277 Article 73 (e) & (b) of the UN Charter 1945.

under UN supervision in the British mandated territory of Togoland.²⁷⁸ The majority voted for a merger with the British colony of the Gold Coast, now Ghana. The UK manifestly accepts that there can be different 'peoples'/groups within a State and as an administering power divided its colonies on the basis of plebiscites.

Likewise, in 1961, referendums were held in British Cameroon and the northern part voted to become a part of Nigeria while the southern part joined French Cameroun. Similarly, British India was divided on the basis of religion under the Two Nation Theory into India and Pakistan. In July 1947, during the division of British India, referenda were conducted in the Sylhet district of Assam and the North West Frontier Province in consonance with Mountbatten's 3 June 1947 plan.²⁷⁹ The referendum in Sylhet was particularly problematic, as it was located in Assam, which was predominantly a non-Muslim province contiguous with Bengal, which was largely Muslim.²⁸⁰

In terms of determining the 'will' of the people, the UK has allowed for the right to self-determination to be exercised through elections²⁸¹ and referenda. In September 1967, a referendum was held in Gibraltar to determine the will of the people and they chose to remain a part of the UK and not to transfer Gibraltar's sovereignty to Spain.²⁸² Likewise in August 1995, a referendum was held in Bermuda and the result was against independence.²⁸³ Within the UK, referenda were held in Northern Ireland in 1973 about whether to remain in the UK; in Scotland and Wales in 1979, on devolution; by all the people in the UK on the membership of the European Community in 1975; in Scotland, on devolution in 1997; in Northern Ireland, on 22 May 1998 about ratifying the Good Friday Agreement, officially known as the Belfast Agreement of 10 April 1998;²⁸⁴ in Scotland again on 18 September 2014, about secession from the

²⁷⁸ GA Res. 944 (X).

²⁷⁹ Bidyut Chakrabarty, 'The Hut and the Axe: The 1947 Sylhet Referendum' (2002) 39 *Indian Economic Social History Review* 317, 317.

²⁸⁰ 3 June Statement quoted in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942-7* (HMSO 1983) vol XI 92.

²⁸¹ Letter dated 13 April 1982 from the UK Permanent Representative to the UN (Sir Anthony Parsons) to the President of the SC, UN Doc. S/14973.

²⁸² Second Report, UN Doc. CCPR/C/32/Add. 14, 47 Annex E, para 3.

²⁸³ On 15 and 16 August 1995 referendum was held in Bermuda. See, *Bermuda Sun*, 18 August 1995. In case of Hong Kong the UK has confirmed to determine the wishes of the people by consulting them. See the statement of the UK representative to the HRC (Mr Beamish) on the Third Report, UK Doc. CCRP/SR.1046, 9-10, para 42.

²⁸⁴ Staff, 'The 1998 Referendums' (Northern Ireland Elections, 17 February 2002) <<http://www.ark.ac.uk/elections/frefg8.htm>> accessed 20 November 2016.

UK;²⁸⁵ and across the whole of the UK on 23 June 2016, about whether the UK should leave the European Union (Brexit).²⁸⁶

The conduct of the UK shows the acceptance of self-determination as a right and not merely as a principle without practical utility. In 1986, the UK Permanent Representative to the UN, Sir John Thomson, clarified the UK position on the right to self-determination by calling it an 'inalienable right'²⁸⁷ and, as such, accepting it as their legal obligation. The UK's legal position on the right to self-determination is clearly not limited to their legal obligations as an administering power in their NSGTs but rather 'forms [a] fundamental part of the UK foreign policy'.²⁸⁸

In the UK, the right to self-determination was always seen as 'applicable to all people'. This is clearly reflected in their reports to the Human Rights Commission, in which the UK has asserted its support for the right to self-determination and the exercise of that right within the UK itself. The UK thus reports on its actions concerning the exercise of the right to self-determination in Scotland, Northern Ireland, and Wales, as well as in its 'internally self-governing dependences' like Guernsey, Jersey, and the Isle of Man. In 1978, the initial British submission to the Committee contained a detailed report on the manner in which the right to self-determination/self-government was promoted in the British Dependencies of Belize, Bermuda, British Virgin Islands, Cayman Islands, Channel Islands, Gibraltar, Gilbert Island, Hong Kong, St Helena, and the Turks and Caicos Islands.²⁸⁹

The UK has also stressed that the exercise of the right to self-determination is applicable in both colonial and independent territories, as well as within its state borders.²⁹⁰ For instance, Britain accepted the German people's right to self-determination by ratifying the Treaty on the Final Settlement in 1990.²⁹¹ The UK also recognised the new states in Eastern Europe upon the break-up of

285 Staff, 'Scottish independence referendum (Archived)' (Gov.uk, undated) <<https://www.gov.uk/government/topical-events/scottish-independence-referendum>> accessed 10 October 2016.

286 Staff, 'EU referendum (Archived)' (Gov.uk, undated) <<https://www.gov.uk/government/topical-events/eu-referendum>> accessed 10 October 2016.

287 Statement in letter by a UK Permanent Representative to the UN (Sir John Thomson) 31 January 1986, quoted in McCorquodale, (n 264) 287.

288 Statement of the Foreign Secretary, Francis Pym, 29 September 1982 cited in McCorquodale, (n 264) 287.

289 UK, Article 40 CCPR, Report, UN Doc. CCPR/C/1/Add.37 (1978), Annexes.

290 Statement of the UK Representative, Mr Hoare to the Third Committee of the GA, 642nd Mtg (1954) 90, para 15.

291 Preamble to the Treaty, (1990) 29 International Legal Materials 1186.

the former Soviet Union, upholding the right to self-determination.²⁹² In 2008, the UK also recognised the unilateral declaration of independence of Kosovo from Serbia.²⁹³

From the foregoing analysis, it is apparent that the UK's state practice has been to respect the exercise of the self-determination of people, be it as an imperial power, administering power, national government, a member of the European Union, or otherwise within the international community. Since the shift to decolonisation it has been the UK's legal and foreign policy to acknowledge the right of all people to determine their 'will' both internally as well as externally. Hence, from the UK's perspective, 'self-determination is not a matter for negotiation':²⁹⁴ it is an entitlement.

The Decolonisation of a British Bastion – Kashmir: A Legal Evaluation

As far as the applicability of the right to self-determination to Kashmir during decolonisation is concerned, it has to be analysed and interpreted with reference to the law in force during that period.²⁹⁵ If Kashmir was to be decolonised in 1947, the law that was applicable to it was a statutory regime covered under Section 7 (1) (a) of the Indian Independence Act 1947, the UK policy on plebiscites and international law on self-determination. Section 7(1) (a) of the IIA 1947 states:

As from the appointed day [15 August 1947] ... His Majesty's Government in the United Kingdom have no responsibility *as respects the government of any of the territories, which, immediately before that day, were included in British India*.²⁹⁶ (Emphasis added)

292 EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union of 16 December 1991, (1993) 4 European Journal of International Law 72.

293 Foreign & Commonwealth Office, 'Foreign Secretary visit to Kosovo' (Gov.uk, 10 November 2016) <<https://www.gov.uk/government/news/foreign-secretary-visit-to-kosovo>> accessed 20 November 2016. Staff, 'UK recognises Kosovo independence' *Reuters UK* (London, 18 February 2008) <<http://uk.reuters.com/articlePrint?articleId=UKL1824693920080218>> accessed 7 March 2008.

294 Statement of the UK permanent Representative to the UN (Sir John Thomson) to the GA, 27 September 1985, UN Doc. A/40/PV.93, 13–15.

295 Comments of Max Huber in *Island of Palmas (United States v. the Netherlands)* (1928) 2 RIAAJ 829, 845; *Western Sahara* (Advisory Opinion) (1975) ICJ Rep 12 30–31.

296 The Indian Independence Act, 1947.

This section suggests that Britain did not end her responsibility towards the Princely States that 'did not join' British India before or on 15 August 1947. Arguably, since Kashmir, Junagadh and Hyderabad did not join any of the dominions by an appointed day—they were still a British responsibility. However, in the contemporary era this possibility only remains valid for Kashmir. After the occupation of Junagadh, the people were given a chance to express their will in a plebiscite and as far as Hyderabad was concerned, it accepted the occupation and full merger with India without resistance, and thus relinquished its claim.

In light of Section 7(1) (a), Kashmir was not decolonised and therefore has not yet shed its colonial status as a British protectorate. This obligation becomes conclusive in the light of the British foreign policy on self-determination, which unequivocally supports a 'reference to people' to resolve disputes concerning territorial status. The British attitude concerning Kashmir is also enshrined in the 1995 Labour Party resolution. This resolution emphatically stated that Britain 'must accept its responsibility as the former imperial power in a dispute that dates from the arrangements for independence'.²⁹⁷

The British politician, Sir Walter Monckton, was aware of British responsibility towards the Princely States and in a letter to Churchill, wrote that there were many treaties whereby the British Government had guaranteed the protection of certain states against internal disorder and external aggression. He expressed his concern in relation to Hyderabad in the following words:

I must say it sticks in my gizzard when I think of ... letting the *Nizam* [Hyderabad] and the Princes down in favour of Congress. When one thinks of the attitude of the Princes in both World Wars, and that of Congress in 1942, one wonders if we must always be driven to let friends down and appease our enemies.²⁹⁸ (Emphasis added)

Monckton was referring to the Congress rebellion, the 'quit India movement' of 1942, which took advantage of the wartime situation and Britain's weakness. In 1942, Congress abandoned their non-violent ways and embarked on a violent revolution²⁹⁹ at a moment when British fortunes in the Far East were at their lowest ebb. Corfield, the Political Advisor to the Viceroy from 1945–1947,

297 Victoria Schofield, 'Kashmir – Today, Tomorrow?' (1997) 28 *Asian Affairs* 315, 315–16.

298 Choudhry, (n 55) 146.

299 Claude Welch, *Anatomy of Rebellion* (State University of New York Press 1980) 146; RL Johnson, 'Return to India' in RL Johnson (ed), *Gandhi's Experiments with Truth: Essential Writings by and About Mahatma Gandhi* (Lexington Books 2006) 17, 42.

affirmed that if effective protection for the Princely States was no longer to come from the Crown, rulers had the right to protect themselves.³⁰⁰ These statements, along with the British commitment under Section 7 of the IIA 1947 essentially form a British *opinio juris* that, along with their state practice, creates a custom and convention that they cannot abandon.

As discussed in Chapter 3, self-determination in the cases of NSGTs is applicable to European colonial possessions. However, despite limitations, there is a possibility to extend the NSGT concept to an occupied and abandoned European colony annexed by a contiguous neighbouring State. Seemingly, the designation of a territory as an NSGT is not reliable and territories have been removed from or reinstated on the list by the administering power or UN based on subjective standards. For example, the UK removed Hong Kong from the list but acknowledged that its removal did not affect its legal status.³⁰¹ New Caledonia, on the other hand, was re-inscribed on the UN List of NSGTs by the Special Committee on Decolonisation in 1986; it had been unilaterally removed from the list by France in 1947.

Arguably, one can presume that even if Britain did not put forth any proposal for the inclusion of Kashmir as an NSGT, this neither affects its legal status nor prevents its people from exercising their right to self-determination to decide the status of the territory. Although the decolonisation resolutions outlaw colonialism, an administering power such as Britain was not compelled to categorise its colony as an NSGT. Conversely, it is also arguable that Britain, by not recommending NSGT status for Kashmir, seemingly accepted that it was a self-regulating entity just as India and Pakistan were following British withdrawal. Further, one could also claim that Britain, by not labelling Kashmir as an NSGT, acknowledged that it was not backward or 'a less advanced civilization',³⁰² as most of the NSGTs were, and was able to function as a state immediately after the holding of a plebiscite. Since a plebiscite was not conducted in Kashmir under the UN Resolution 1541, there was a possibility for the General Assembly to declare Kashmir an NSGT. This is particularly true because Britain abandoned the Princely State of Kashmir in contravention of Section 7(1) (a) of the Indian Independence Act 1947.

300 IOR: R/3/1/136: Paramountcy and the Interim Period, April 1947 [BL].

301 The Letter from the UK Permanent Representative to the UN to the Secretary General of the UN, 19 December 1972. See, N. Jayawickrama, 'The Right of Self-determination' in P Wesley-Smith (ed), *Hong Kong's Basic Law: Problems and Prospects* (University of Hong Kong 1990) 91–93.

302 Ruth Gordon, 'Saving Failed States: Sometimes a Neocolonialist Notion' (1997) 12 *American University Journal of International Law and Policy* 903, fn 268.

The real legal effect of labelling Kashmir an NSGT would have been to guarantee it self-government, which would have secured the exercise of the right to self-determination, eventually leading up to the restoration of historical title in their territory. Clearly, it would have facilitated the Princely State of Kashmir to reclaim its colonial borders under the principle of *uti possidetis*. Obviously by not adding Kashmir to the UN List of NSGTs, it was more vulnerable in comparison to the listed territories, whose claims to realise their right to self-determination was institutionally protected.³⁰³ The sole purpose of the NSGT structure was to promote 'self-government, independence, and self-determination' of colonies in accordance with UN Charter articles 73, 76, 1(2) and 55.³⁰⁴ Arguably, that purpose was not achieved as Britain abandoned the Princely State of Kashmir without setting up a proper arrangement for its decolonisation, which resulted in making it a soft target for Indian aggression.

However, it is significant to note that repeated promises to hold a plebiscite in Kashmir were made by Mountbatten,³⁰⁵ Indian officials,³⁰⁶ and through various UN Security Council resolutions.³⁰⁷ India's 'unilateral declaration' to conduct a plebiscite in Kashmir is binding on her as an international agreement.³⁰⁸ As per ICJ jurisprudence, the public pledge by a state is equivalent

303 Statement by Ambassador Inam-ul-Haque, the Permanent Representative of Pakistan to the UN on Agenda items 12, 18, 92, 93, 94 & 95, 'Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples', 06/10/1999; Statement of Pakistani delegate T.S. Chaudhry, in: 'Adminstrating Powers' Responsibility in Remaining Territories Stressed, as Fourth Committee Concludes General Debate on Decolonization', GA 4th Committee, 6th Mtg, 12 October 2001 Press Release GA/SPD/214 and 'Right of Non-Self-Governing Territories to Self-Determination Reaffirmed', 57th GA, Fourth Committee, 6th Mtg, 4 October 2002, Press Release, GA/SPD/238.

304 Quincy Wright, 'Recognition and Self-determination' (1954) 48 Proceedings American Society of International Law, 23 ff.

305 FO 371/129775: Letter Dated 27 October 1947 from Governor General of India Mountbatten to Maharaja of Kashmir [NAL]; PL Lakhanpal, *Essential Documents and Notes on Kashmir Dispute* (International Books 1965) 57 & A Bhattacharjea, *Kashmir: The Wounded valley* (UBS Publishers 1994) 150.

306 Gandhi, *Times of India*, 7 June 1947; Jayaprakash Narayan, the then leader of the Socialist Wing of the Indian Congress, *Times of India* 30 October 1947. Nehru, in a broadcast, forcefully declared to the world on 2 November 1947, Government of India, *White Paper on Jammu and Kashmir* New Delhi, 1948, 52–53.

307 (n 245) Para 1.

308 *Legal Status of Eastern Greenland (Denmark. v. Norway.)* April 5 1933 PCIJ (series A/B) No. 53.

to a binding legal obligation.³⁰⁹ In the British Indian sub-continent, the conduct of a plebiscite was not novel. In fact, plebiscites were conducted in NWFP, Sylhet, and Junagadh. The plebiscite in Junagadh³¹⁰ was on 24 February 1948,³¹¹ after India annexed it militarily.³¹² The plebiscite was conducted after its ruler had already acceded to Pakistan.³¹³ These referenda show that Britain had a policy to conduct plebiscites to determine the 'will of the people' both before and after the partition, and that India accepted that policy. However, India only exercised their promises with respect to that policy when it suited their political ends. As seen, plebiscites were conducted to determine the will of people, even in cases where the ruler may have signed an Instrument of Accession, as in the case of Junagadh. Therefore, it is apparent that India cannot abandon its obligation to conduct a plebiscite in Kashmir as it is the successor state of British India. It is to be remembered that as a successor state, India has not just inherited rights but also obligations, and it therefore has an obligation to conduct a plebiscite in Kashmir.

Finally, the Princely State of Kashmir is not only entitled to self-determination because it was under colonial rule, but also because there was an uprising against the repressive rule of the Maharaja. As discussed in Chapter 2, by the early 1930s Kashmiri people were aware of their democratic rights, and had started a civil rights movement against their autocratic ruler. However, this movement for self-determination was slowed down due to the partition of British India. In its frenzied haste, Britain totally ignored its responsibility towards Kashmir, despite the fact that Kashmir had not joined any of the new dominions by 15 August 1947.

In light of the above discussions it is maintained that if the Kashmir situation had been resolved in 1947, and if Britain had not abandoned its commitments, the territory of Kashmir would not have been divided nor be illegally occupied today. Britain acted contrary to its policy on self-determination, as well as its official legislation on decolonisation. All the evidence suggests that

309 Gerald G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–54: Treaty Interpretation and Other Treaty Points' (1957) 33 *British Yearbook of International Law* 30; Opinion of the judges Fitzmaurice and Spender in the *South West Africa cases* (preliminary objections), ICJ Reports 1962, 474–76.

310 Devin T Hagerty and Herbert G Hagerty, 'India's Foreign Relations' in Devin T Hagerty (ed), *South Asia in World Politics* (Rowman & Littlefield 2005) 11, 18.

311 Michael Brecher and Jonathan Wilkenfeld, *A Study of Crisis* (University of Michigan Press 1997) 166.

312 Widmalm, (n 220) 32; Robert F Gorman, *Great Debates at the United Nations-An Encyclopedia of Fifty Key Issues, 1945–2000* (Greenwood Press 2001) 87.

313 Brecher and Wilkenfeld, (n 311) 166.

Kashmir, being a case of 'incomplete decolonisation', is entitled to exercise its right to self-determination. Clearly, the exercise of self-determination under decolonisation resolutions would generate an avenue for Kashmir to restore its historical title. As discussed in Chapter 3, the application of these two principles is possible in relation to the situation 'only if' the restoration of historical title is the main aspiration of the people claiming self-determination. Kashmir is therefore an appropriate case for such an application, because it is the restoration of historical title that generates a claim for self-determination. Practically speaking, it is the realisation of the right to self-determination that brings to life the principled aim of restoring historical title to Kashmir.

Conclusion

The present chapter attempted to assess the legal validity of the Instrument of Accession and the subsequent illegal annexation of Kashmir by India. Document 1931 shows that, historically, Kashmir was a British protectorate. British India had signed the Treaty of Amritsar in 1846 with the Maharaja under which, among other things, they owed a responsibility to provide military assistance whenever required. The legal appraisal of the statehood of Kashmir demonstrated that in 1947, after the decolonisation of British India, it was a state. When British India ceased to be, the paramountcy of the Crown over the Princely State of Kashmir lapsed under the statutory regime of British Mission Memorandum 1946. Further, under the structure of the Indian Independence Act 1947 Kashmir did not accede to either India or Pakistan by the stipulated date of 15 August 1947, rendering it legally independent.

However, the archival documents suggest that the process of intimidation started long before any actual IOA was signed by the Maharaja with India. The political lobbying by Congress to pressurise the Maharaja to join the Dominion of India was spearheaded by Nehru and supported by Mountbatten.³¹⁴ Congress had the political agenda to push for the transfer of paramountcy to India;³¹⁵ however, paramountcy lapsed after British withdrawal. Kashmir, by not joining any of the dominions by 15 August 1947, became an independent

314 Telegram of Mountbatten to the Earl of Listowel and Letter from Menon to Mountbatten dated 18 July 1947 in Nicholas Mansergh and Penderel Moon (eds), *The Transfer of Power 1942–7* (HMSO 1983) vol XII 156, 255–56.

315 Morris-Jones, (n 3) 10.

and sovereign state. The Legal Advisor to the British Foreign Office, Fitzmaurice, offered the authoritative, revised legal opinion on the validity of the IOA and suggested that it was not capable of finally settling the status of Kashmir. Generally, the view of the UK Attorney General and the Foreign Office Legal Adviser was that the Maharaja's execution of the IOA to India was inconsistent with Kashmir's obligations to Pakistan and, for that reason, was perhaps invalid.³¹⁶ This was mainly because (1) the Maharaja was *not a free agent* at the time of the accession; (2) he was *not in proper control of his State* and could not, as he had undertaken to do, ensure that due effect was given to the accession in his State; and (3) the *acceptance was conditional*.³¹⁷ The provisional nature of the IOA can be seen from the fact that it comes with a requirement to hold a plebiscite, and India cannot escape this commitment.³¹⁸

On a legal level, India airlifting troops into Kashmir under the invalid IOA amounted to occupation. Kashmir is hence entitled to claim restoration of its historical title since internationally, its annexation is not recognised. Kashmir is therefore perfectly positioned to claim its state continuity and the restoration of its identity, which it lost due to aggression and the illegal use of force. Under the principle of postliminium, Kashmir's continuity is seemingly in abeyance until it exercises its right to self-determination.³¹⁹ Kashmiris have also kept their nation alive through their 'mental continuity' since its unlawful seizure in 1947.

The discussions in this chapter also suggest that Kashmir is entitled to self-determination from a decolonisation perspective. Under the statutory regime of Section 7 (1) (a) of the IIA 1947, Kashmir was under British responsibility as it had not joined any of the dominions by 15 August 1947. Keeping in view Britain's policy and practice when it comes to self-determination, Britain seemingly acted in contravention to them by abandoning Kashmir. The abandonment resulted in Kashmir being seized by the neighbouring states of

316 Memorandum by the Assistant Secretary of State for Near Eastern, South Asian, and African Affairs (McGhee) and the Assistant Secretary for United Nations Affairs (Hickerson) to Secretary of State, [Washington] 6 February 1950 in *FRUS*, 1950, Vol. v, The Near East, South Asia, and Africa (1978) 1379.

317 F 10914/10125/85, (n 160).

318 FO 371/129777: DY1041/295 – Record of a meeting at 10 Downing Street, 28 June 1957 between Prime Minister, Foreign and Commonwealth ministers and Mr Suhrawardy, Mr Ikramullah and Firoz Khan Noon [NAL].

319 Emer de Vattel, *Law of Nations or the Principles of Natural Law* (Charles G. Fenwick Tran 1916) III, at 313.

India and Pakistan. Kashmir, hence, was never legally a part of India.³²⁰ In fact, India has explicitly accepted Kashmir's sovereignty by recognising the need for a plebiscite.³²¹

The discussions in this chapter suggest that Kashmir's historical title was not legally extinguished in 1947. Clearly, Britain and India showed willingness to hold a plebiscite in Kashmir; however India has subsequently reneged on its legal obligation. The revised opinion from Fitzmaurice, which compared Kashmir with the Baltic States, suggests that in the absence of a valid accession, this is a case of annexation by military force. This occupation has lasted for 70 years and has become oppressive, as India has constitutionally incorporated the territory of Kashmir into its union, which has also led to reprehensible violations of political and economic rights. This aspect will be discussed in the next chapter.

320 RG Wirsing, *India, Pakistan and the Kashmir Dispute: On Regional Conflict and its Resolution* (St. Martin's Press 1994) 14.

321 *India and Kashmir – Constitutional Aspect* (Ministry of Information and Broadcasting Jammu and Kashmir Government, 1963) 5 [JKA (S)]; FO 371/129775; Letter Dated 27 October 1947 from Governor General of India Mountbatten to Maharaja of Kashmir [NAL].

Incorporation of Kashmir into the Indian Union: An International Assessment on Human Rights and Democratic Government

Introduction

This study has so far attempted to examine the socio-political aspects of the Kashmir problem. It has been shown that adopting an interdisciplinary approach and reviewing the Kashmir question from historical and legal standpoints, taking into account archival materials and international law, provides an appropriate avenue for properly addressing this issue. In the previous chapter it was contended, based on Fitzmaurice's revised legal opinion on the validity of the Instrument of Accession (IOA), that (1) the Maharaja was not a free agent at the time of the accession; (2) he was not in proper control of his state and could not, as he had undertaken to do, ensure that due effect was given to the accession in his state; and (3) the acceptance was conditional.¹ In the aftermath of war of 1947 which led to the division of Kashmir between India and Pakistan, the people in Indian Occupied Kashmir have been forced to live under non-representative regimes nominated by India.² The main focus of the present chapter is to discuss and critically analyse the Indian incorporation of the entire territory of the former Princely State of Jammu and Kashmir (J&K) into its union through the Indian constitution. The incorporation by India of the former Princely State of Kashmir took place despite the fact that the territory of the Princely State of Kashmir was by then divided into Indian-Occupied and Pakistani-Occupied Kashmir (POK). India did not have control over the entire territory of Kashmir.³ As discussed in Chapter 2, neither Pakistan nor China has constitutionally incorporated the territories of Kashmir that they claim – respectively, POK and Aksai Chin – into their states.

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- 1 F 10914/10125/85; Fitzmaurice's Opinion on Legal Validity of Kashmir's Accession to India, 26 May 1949 appended to 'The Right Hon. P.J. Noel Baker (Commonwealth Relations Office) to Sir Hartley Shawcross (enclosed only)' 3 June 1949, para 1 (Unpublished Source).
 - 2 For rigging of elections in Indian Occupied Kashmir, see generally Anne Noronha Dos Santos, *Military Intervention and Secession in South Asia* (Praeger Security International 2007) 70–71.
 - 3 See generally Fozia Nazir Lone 'The Creation Story of Kashmiri People: The Right to Self-Determination' (2009) 21 Denning Law Journal 1.

In recent times, Pakistan has affirmed that the final status of the former Princely State of Kashmir will be determined through the conduct of a plebiscite under the auspices of the UN, to which India has not agreed. However, it is significant to mention here that in Pakistani-Occupied Kashmir, elections are not free and fair and vote-rigging was reported in 2006⁴ and 2016.⁵ Vote rigging and electoral fraud, which is the norm in Pakistan, is also the norm in POK.⁶ Despite the claim that POK has an *azad* (free) government, in reality, the civilian government in POK follows the dictates of the government in Islamabad. The legislative assembly creates laws in line with will of Pakistani officials, and the Election Commission is comprised of members acceptable to Pakistani authorities.⁷ This is compounded by the fact that 3 out of 4 major political parties in POK are extensions of Pakistan-based parties and that political groups calling for the independence of Kashmir are forbidden from partaking in elections under the 1974 constitution imposed by Pakistan.⁸ The Jammu and Kashmir Liberation Front (JKLF), for example, having been founded before Partition to rally for the independent state of Jammu and Kashmir, was subsequently destroyed by the Pakistani military.⁹

Human rights violations are also rampant in POK, leading to Kashmiris in POK to demand for accountability and independence.¹⁰ Torture is routinely conducted by Pakistani military and intelligence.¹¹ Kashmiri refugees and former militants from Indian Occupied Kashmir are constantly harassed,

4 See generally Katharine Adeney 'Democracy and Federalism in Pakistan' in Baogang He, Brian Galligan & Takashi Inoguchi (eds) *Federalism in Asia* (Edward Elgar Publishing 2007) 101, 103.

5 FE Online, 'PoK burns, as protests breakout against rigged elections; Nawaz Sharif's party and ISI blamed' (*The Financial Express*, 27 July 2016) accessed 10 October 2016.

6 Aili Piano, *Freedom in the World 2009: The Annual Survey of Political Rights and Civil Liberties*. (Rowman & Littlefield 2009) 860.; Staff, 'Pakistan: Abuses Feared in Kashmir Elections' (Human Rights Watch, 7 July 2006) <<https://www.hrw.org/news/2006/07/07/pakistan-abuses-feared-kashmir-elections>> accessed 19 March 2017.

7 Shamil Shams, 'How free is Pakistan-administered Kashmir?' (DW Made for Minds, 21 July 2016) <<http://www.dw.com/en/how-free-is-pakistan-administered-kashmir/a-19416247/>> accessed 19 March 2017.

8 Christophe Jaffrelot, *Pakistan: Nationalism without a Nation* (Zed Books 2002) 296.

9 Gaurav Bhatnagar, 'The Islamicization of Politics: Motivations for Violence in Kashmir' [2009] 20 (1) *The Journal of Politics and Society* 1.

10 Brad Adams, 'Pakistan: "Free Kashmir" Far From Free' (Human Rights Watch, 21 September 2006) <<https://www.hrw.org/news/2006/09/21/pakistan-free-kashmir-far-free/>> accessed 19 March 2017.

11 Human Rights Watch, 'With Friends Like These...' *Human Rights Violations in Azad Kashmir*. Human Rights Watch (2006) Volume 18, No.12 (C), 54.

arrested, beaten (sometimes even to death) and surveilled by POK. Freedom of expression is severely curtailed through restrictions of independent media and the banning of independence-related publications.¹² There is, furthermore, no accountability for the forced disappearances of thousands of people, including Pakistani army personnel and those involved in spying for Pakistan or suspected of spying for India.¹³ The cumulative effect of such human rights abuses is the entrenchment of POK maladministration which has fuelled the people of Kashmir to fight for independence in both militant and non-militant ways.

China has affirmed that after the settlement of the Kashmir dispute, the sovereign authority in Kashmir can reopen negotiations with China on the boundaries of Aksai Chin.¹⁴ It should be noted at this point that Aksai Chin is not an inhabited territory and can be appropriately classified as the subject of a territorial dispute rather than a situation that gives rise to issues concerning the exercise of the right to self-determination by the people. This reason clearly explains why only the incorporation of the Princely State of Kashmir through the Indian constitution requires legal consideration.

The bulk of this chapter discusses two major legal questions. The first question analyses whether India could, based on the *invalid* IOA and the military annexation, acquire a valid title to the entire territory of Kashmir through its constitutional incorporation. In other words, could the acquisition and control of territory through military occupation entitle an occupier to claim valid title to the seized territory? This chapter will begin by evaluating the legality of the constitutional incorporation with reference to the validity of the IOA, which has been professed to be the flagpole of the Indian position.¹⁵ The second question will evaluate whether the installation of a pro-Indian unrepresentative government chosen by India, coupled with massive human rights violations of a political and economic nature, provides Kashmiris a valid avenue under the contemporary international law to claim the right to self-determination. This discussion is carried out in two steps: (1) an analysis of the extent to which India has demonstrated 'peaceful and continuous display of a State authority'¹⁶ over

12 *Human Rights Watch World Report 2007* (Seven Stories Press, 2007) 306.

13 Asian Legal Resource Centre, 'Pakistan: Thousands Of Persons Remain Missing' (Scoop, 27 August 2010) <<http://www.scoop.co.nz/stories/WO1008/S00470/pakistan-thousands-of-persons-remain-missing.htm>> accessed 19 March 2017.

14 The Sino-Pakistan Frontier Agreement 1963, art VI; Mohan Ram, *Politics of Sino-Indian Confrontation* (Vikas Publishing House Pvt Ltd 1973) 4.

15 HO Agarwal, *International Law and Human Rights* (Central Law Publications 2004) 167.

16 *Island of Palmas* (1928) 2 RIAA 829 at 829.

the territory of Kashmir since 1947, followed by (2) an assessment of the extent to which international law along with the Friendly Relations 1970 Declaration is applicable to Kashmir in the traditional sense, and how it could be applied to a claim of 'constitutional secession'. This part of the critique will fully examine the circumstances under which the Indian constitutional incorporation led to the installation of a non-representative government in Kashmir. The role of the installed non-representative government (hereinafter 'Nominated or Pro-Indian Government') in the incorporation of Kashmir into the Union of India will be evaluated. To verify the legitimacy of the Nominated Government, the domestic legislation that helped to bring them to power, as well as the means used, will be discussed. Additionally, development in relation to democracy as well as the overall human rights situation will be examined. Indeed, militarism and human rights violations have always been prevalent in the administration of Indian-occupied Kashmir.¹⁷ From an international law perspective, the big question remains: to what extent such a Nominated Government, implanted by India with the sinews of militarism, can claim territorial sovereignty over Kashmir without effective governance?

The Illegal Incorporation of the Princely State of Kashmir into the Indian Union after Occupation in 1947: An Analysis of the Relationship between Kashmir and the Union of India

Between the years of 1947 and 1949, India began consolidating its unlawful seizure of Kashmir by installing the Nominated/Pro-Indian Government. After 1950, India began the constitutional incorporation of Kashmir into its union. The five significant steps taken by India were: (1) the setting up of a Nominated Government through the creation of the Kashmir Constituent Assembly; (2) the inclusion of Article 370 into the Constitution of India in 1950; (3) the signing of the Delhi Agreement 1952 between India and the Nominated Government; (4) framing the New Constitution for Kashmir in 1957 and repealing Kashmir's original Constitution of 1939; and (5) the signing of the Indira-Sheikh Accord in 1975.¹⁸ Prior to the constitutional incorporation, there was political deadlock on the Kashmir issue at the UN, which made it an opportune moment for India to execute its plan.

¹⁷ *Unreported World: Killing of Kashmir*, Channel 4 Documentary, 8 April 2004.

¹⁸ Bhim Singh, *Autonomy or Secession Jammu and Kashmir* (Har-Anand Publications Pvt Ltd 2001) 36.

The Position of Kashmir Immediately after the Accession to India: A Critical Review (1947–1949)

Kashmir, after the invalid accession, was incorporated under Part I (The Union and its Territory) of the Constitution of India (COI) and was assigned a place among the Part B states¹⁹ (Article 1)²⁰ in the First Schedule. The First Schedule describes the names of the States and the Unions and states that there are four Categories of States and territories – Part A, Part B, Part C, and Part D.²¹ Part (B) States were ruled by Princes as their executive heads who once appointed could in normal circumstances remain in office for their lifetimes.²² Provisions for Part (B) States were developed for the Indian States that had a special position in the governing scheme of the Indian Empire of Great Britain.²³ Diwan notes that even among the Part (B) States, Kashmir had a special place distinct from the states of Rajasthan or Travancore-Cochin. Kashmir was similar to them in the sense that it was headed by a Prince, but different as under the provisions of Part VII (The States in Part B of the First Schedule) of the COI, which provided constitutional provisions for the other Part (B) states that did not apply to Kashmir. The Union Parliament had no powers to legislate on all subjects of the Union and Concurrent Lists for Kashmir, powers that it had over the other Part (B) Princely States.²⁴ However, by the seventh amendment of the Constitution in 1956, the three categories of States (Part A, Part B and Part C States) were abolished and the states were reorganised on linguistic basis.²⁵ This also led to the repeal of Part VII.

Under COI, for Kashmir, the Union was competent to legislate only on the subjects of defence, foreign affairs, and communications that were delegated

19 GH Khan, *Government and Politics of Jammu and Kashmir* (J.V. Printers 1988) 29.

20 Article 1 states that (1) India, that is Bharat, shall be a Union of States. [(2) The States and the territories thereof shall be as specified in the First Schedule.] (3) The territory of India shall be comprised of – (a) the territories of the States; (b) the Union territories specified in the First Schedule; and (c) such other territories as may be acquired. The Constitution of India, Published by Government of India, Ministry of Law and Justice (Legislative Department), 9 November 2015. <<http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf>> accessed 17 December 2016.

21 See Subhash C Kashyap, *Our Constitution: an Introduction to India's Constitution and Constitutional law* (2nd edn, National Book Trust) 80.

22 Paras Diwan, 'Kashmir and the Indian Union: The Legal Position' (1953) 2 *The International and Comparative Law Quarterly* 333, 334.

23 *ibid* 335.

24 *ibid* 342.

25 The Constitution (Seventh Amendment) Act, 1956, s. 29 and Sch.

to the Union under the Instrument of Accession (IOA).²⁶ Commenting on the IOA, the Supreme Court of India in *Prem Nath Kaul v Jammu & Kashmir* observed:

We ... reject the argument that the execution of the Instrument of Accession, affected in any manner the legislative, executive and judicial power in regard to the Government of the State, which then vested in the ruler of the State.²⁷

Accordingly, sovereignty over the internal administration of the state remained with the ruler of Kashmir.²⁸ In this regard, Gopalaswami Ayyangar, who was the head of the Indian delegation to the UN, affirmed that:

Whereas in the case of other Indian States Instrument of Accession will be the thing of the past in the new Constitution ... it would not be so in the case of Kashmir since that particular State is not yet ripe for this kind of integration due to the special conditions prevailing in Kashmir.²⁹

The specific conditions prevailing in Kashmir were mainly based on the IOA, which was subject to the conduct of a plebiscite to determine Kashmir's status.³⁰ Although sovereignty over the internal administration of Kashmir should have remained with Maharaja Hari Singh, in November 1947 the Maharaja came under pressure from India to nominate Abdullah as the Emergency Administrator for the State of Kashmir³¹ under the Jammu and Kashmir Constitution Act 1939.³² Clearly the Maharaja was not satisfied with this arrangement and wanted to draw up a scheme along the lines of the IOA.³³ In a letter, Maharaja Hari Singh clearly stated that his proposals were not acceptable to India and that he felt compelled to issue a proclamation to establish an

26 Mohan Krishen Teng, *Kashmir Article 370* (Anmol Publications 1990) 44.

27 AIR 1959 SC (India) 749; *Rehman Shagoo v. State of Jammu and Kashmir*, AIR 1960 SC (India) 1; The Instrument of Accession of Jammu and Kashmir State, 26 October 1947.

28 The Instrument of Accession of Jammu and Kashmir State, 26 October 1947, para 8.

29 *Constituent Assembly Debates* (India), vol x, no10 at 422.

30 FO 371/129775: Letter dated 26 October 1947 from Maharaja of Kashmir to the Governor-General, Lord Mountbatten [NAL].

31 Adarsh Sein Anand, *The Constitution of Jammu and Kashmir – Its Development & Comments*, (4th edn, Universal Law Publishing Co. Pvt Lt 2004) 65.

32 Act XIV of Samvat 1996 (1939 AD).

33 Mohan Krishen Teng, and Santosh Kaul, *Kashmir's Special Status* (Oriental Publishers & Distributors 1975) 37–38.

Interim Government.³⁴ The Maharaja, under such coercion, issued the Proclamation on 5 March 1948, which replaced the Emergency Administration with the Interim Government, and Abdullah was installed as the Prime Minister.³⁵ Clearly such a proclamation was not part of an accession to India. The Legislative Assembly (*Praja Sabha*) was coerced into drafting the 'New Kashmir' Constitution.³⁶ The Jammu and Kashmir Constitution Act 1939 was subjected to a process of repeal. It appears that forcing such developments was seen as necessary for the complete constitutional integration of Kashmir into the Union of India. Such expansion of Indian power was not authorised under the IOA, and the Maharaja had not committed himself to accepting that Kashmir would be included in any future constitution of India.

By 1949, the ongoing tension between Abdullah and the Maharaja escalated. Finally, Abdullah asked his friend Nehru, the Prime Minister of India, to pressure the Maharaja to abdicate.³⁷ As a result of pressure from the Government of India, the Maharaja left the state on 29 April 1949 appointing his son, Yuvraj Karan Singh, as the head of the state.³⁸ Maharaja Hari Singh issued a Proclamation on 20 June 1949, vesting legislative powers in Yuvraj Karan Singh³⁹ before he was divested of his powers. This Proclamation, which was temporary in nature, proved to be the last official act of Maharaja Hari Singh – an act that permanently installed Yuvraj Karan Singh. On 25 November 1949, Yuvraj Karan Singh issued a proclamation repealing the Government of India Act 1935, which at that time governed the relationship between Kashmir and India.⁴⁰ This proclamation allowed a limited application of the Indian Constitution to the State of Kashmir.⁴¹ This proclamation resulted in the introduction of temporary provision, Article 370, into the Indian Constitution to integrate Kashmir into India by giving it some sort of special status.⁴² India also sought

34 Quoted in Letter from Maharaja Hari Singh to Gopalaswami Ayanger, 17 Dec 1947, *Sardar Patel's Correspondences*, vol I, 94 (as cited in Teng and Kaul, (n 33) 38).

35 *Constituent Assembly (Legislative) Debates* (India, 1948), vol III, 1656.

36 Anand, (n 31) 118.

37 Quoted in Abdullah to Nehru, 1 June 1948, *Sardar Patel's Correspondence*, vol I, 268 (as cited in Teng and Kaul, (n 33) 40).

38 Teng and Kaul, (n 33) 40.

39 Quoted in *Prem Nath Kaul v. Jammu & Kashmir* AIR 1959 SC (India) 749 at 754; Anand, (n 31) 91.

40 Proclamation of 25 November 1949 in *White Papers on the Indian States*, Appendix LIV, 371–72.

41 *ibid.*

42 Mohan Krishen Teng, *Kashmir Myth of Autonomy* (Anmol Publications Pvt Ltd 1990) 63.

the support of a local party, the 'All Jammu and Kashmir National Conference' (NC), headed by Abdullah,⁴³ to start the invalid constitutional incorporation of Kashmir into its union. This move was rejected in SC resolution 122 of 1957, which states that the future shape and affiliation of Kashmir (in part or as a whole) cannot be decided by the actions of the NC or any other parties.

*The Position of Kashmir after the Drafting of the Indian Constitution
1950: A Gateway to the Full Incorporation of Kashmir with the
Assistance of the Nominated Government*

After the COI came into force in 1950, India integrated Kashmir constitutionally through Article 1(3)⁴⁴ and 370.⁴⁵ Article 370, which was created as an autonomy provision, was added to the COI to cover the special situation in Kashmir.⁴⁶ This article helped to define the post-1950 relationship between Kashmir and India and was intended to be of a 'temporary' character.⁴⁷ Article 370 (1) (b) (i) reiterated that the power of Parliament to make laws for J&K shall be limited to matters corresponding with the IOA. Clearly, Article 370 limited the powers of the Indian Parliament to make laws for the State of J&K in the matters specified in the IOA, i.e. defence, communications, and foreign affairs.⁴⁸ However, under the powers conferred by Article 370 the President was made competent to issue orders from 17 November 1952. However, one major Presidential order, the Constitution (Application to Jammu and Kashmir) Order 1950, was issued prospectively. This order specified new matters (and modified existing matters) in relation to which the Union Parliament was competent to make laws binding on the State of J&K. The following provisions of the Indian Constitution were extended to Kashmir: relations between Union and the States; finance; elections; special provisions regarding Anglo-Indians; Scheduled Castes, Scheduled Tribes and Scheduled Areas; official language; procedure for amending the Constitution (Article 368); and provisions repealing the Government of India 1935 and Indian Independence Act 1947 to the extent that they

43 The Hon'ble Sheikh Mohammed Abdullah, *J&K Constituent Assembly*, Opening Address (5 November 1951); Josef Korbel, *Danger in Kashmir* (Princeton University Press 1954) 220.

44 Article 1 (3) (c) of the Indian Constitution 1950, 'the territory of India shall comprise of – (a) the territories of the States ... such other territories as may be acquired'.

45 Teng, (n 26) 76; Khan, (n 19).

46 Anand, (n 31), 74.

47 *Constituent Assembly Debates* (India), vol x, no10; Article 370 of the Indian Constitution, 1950.

48 Charles Henry Alexandrowicz, *Constitutional Development in India* (OUP 1957) 154.

were applicable to Kashmir.⁴⁹ Almost 205 central laws were transported to J&K through Article 370.⁵⁰ Article 370 also created the possibility of extending these matters with the concurrence of the Jammu and Kashmir Constituent Assembly (JKCA) and an order from the President of India.⁵¹

Historically, under the Order of 1950 the President of India was not in a position to modify or abrogate from Article 370 without the approval of the JKCA.⁵² The nominated Constituent Assembly was as such required to provide the necessary consent to modify or amend Article 370 as required.⁵³ The Pro-Indian Government was also required to assist the GOI to introduce new subjects so that the Union Parliament could make laws for J&K. The JKCA was convened on 27 October 1950 and, as expected, many laws were introduced to Kashmir. It is to be noted that this assembly, which was headed by the NC, was not recognised by the International Community as seen in UN Security Council Resolution 122. On 10 June 1952, the JKCA terminated hereditary rule in Kashmir and replaced it with an elected head of state, the *Sadar-i-Riyasat*.⁵⁴ Subsequently, the Nominated Kashmir Government conferred with the representatives of Indian Government and arrived at an agreement called the Delhi Agreement 1952. Under this accord, the parties agreed to: (1) maintain the special status of Kashmir under the IOA (sec, i); (2) extend Article 5, relating to Indian citizenship, to persons domiciled in the State of J&K (sec, ii); (3) extend the President of India's authority over Kashmir, including powers to grant pardons and remissions of sentences (sec, iii); (4) retain the State flag in addition to Union flag (sec, iv); (5) the *Sadar-i-Riyasat* (Governor) would be elected by the State Legislature, but had to be recognised by the President of India before his installation (Sec v); (6) not to allow the whole chapter relating to 'Fundamental Rights' of the Indian Constitution to be made applicable to the State, (sec, vi); (7) extend the Appellate jurisdiction of the Supreme Court of India to Kashmir (sec, vii); (8) approve the application of Article 352, empowering the President to proclaim a general emergency on account of internal

49 The Constitution (Application to Jammu and Kashmir) Order, 1950, para 2; Anand, (n 31) 102–11.

50 Anand, (n 31) 406–20.

51 Article 370 of the Indian Constitution, 1950, paras (1) b (i) & (ii).

52 Bodh Raj Sharma, 'Special Position of J&K in Indian Constitution' in Verinder Grover (ed), *The Story of Kashmir Yesterday and Today* (Deep & Deep Pub 1995) 173.

53 Quoted in Sheikh Abdullah, Statement on the Delhi Agreement in the State Constituent Assembly on 11 August, 1952 (as cited in Hari Ram, *Special Status in Indian Federalism: Jammu and Kashmir* (Seema Publications 1983) 47).

54 *Jammu and Kashmir Constituent Assembly Debates*, 7 June 1952, vol. IV, no 1–3.

disturbance in the State as well as to declare emergency in the event of war or external aggression. Regarding internal disturbances, it was agreed that emergency would be imposed at the request or with the concurrence of the Government of the State (sec. viii). The provisions of Delhi Agreement 1952 clearly demonstrate that most of the arrangements made were to further incorporate Kashmir into India and to limit the rights of Kashmiris, such as by excluding them from the chapter on fundamental rights in the Indian Constitution, ostensibly due to the peculiar circumstances involved. It is an omission that cannot be logically justified.

The implementation of the Delhi Agreement 1952 was made difficult by the agitation of the *Praja Parishad*, which was a Hindu extremist party founded by Dr Syama Prasad Mookerjee, and a conservative Hindu nationalist party, Jan Sangh.⁵⁵ These Hindu parties demanded the complete merger of Kashmir into India and saw the Delhi Agreement as the nucleus of a separate and independent status for Kashmir.⁵⁶ Mookerjee started a struggle in Jammu against the autonomy of Kashmir⁵⁷ and decided to give the movement a national dimension.⁵⁸ He was arrested on 12 May 1953 when he tried to enter Kashmir without a permit,⁵⁹ which was a requirement for non-Kashmiris, and died in confinement in a hospital.⁶⁰ During his lifetime, Mookerjee had accused Abdullah of trying to carve out an independent Kingdom of Kashmir⁶¹ from India. His death paved the way for Abdullah's arrest and dismissal from the post of Prime Minister. New Delhi believed it had evidence that Abdullah had begun to work for an independent Kashmir. The charge against Abdullah was that he had tried to secede from India with the support of America.⁶² Abdullah was framed and his deputy, the pro-Indian Bakshi Ghulam Mohammed,

55 The Editors of Encyclopædia Britannica, 'Bharatiya Jana Sangh' (Encyclopædia Britannica, undated) <<https://global.britannica.com/topic/Bharatiya-Jana-Sangh>> accessed 10 October 2016.

56 Mir Qasim, *My Life and Times* (Allied Publishers 1992) 62.

57 Norman D Palmer, 'The Changing Scene in Kashmir' (1953) 22 *Far Eastern Survey* 157, 158.

58 Jyoteeshwar Pathik, *Glimpses of History of Jammu and Kashmir* (Jay Kay Book House 1997) 140.

59 IOR/R/2/1071/164: File No. 389(1) of 1946 [BL].

60 Palmer, (n 57) 159.

61 DO 35/5151: Agitation by right-wing parties in support of Praja Parishad Movement in Jammu and Kashmir, 1953 [NAL].

62 Chandrashekhar Dasgupta, 'Jammu and Kashmir in the Indian Union: The Politics' in Rafiq Dissani & Henry S Rowen (eds), *Prospects for Peace in South Asia* (Stanford University Press 2005), 243.

replaced him as Prime Minister.⁶³ In an interview with *The Times of India*, Abdullah said that the 'limited accession to India should be resolved in favour of an independent Kashmir'.⁶⁴ He believed that the accession to India in 1947 had been due to 'force of circumstances'.⁶⁵ According to Bazaz, a Hindu pro-independence leader and academic, the agitation of *Praja Parishad* was purely a strain of Hindu nationalism that had

[t]hrown aside the mark of secularism and came out in its true colours ... It is true that officially both the Government of India and the Congress organisation deprecated the agitation but there is no manner of doubt that Hindu India, which included Congress rank and file, sympathised with the aims and aspirations of the *Praja Parishad*.⁶⁶

Abdullah was jailed under the State Preventive Detention Act for four years and was rearrested in 1958 and charged with conspiring to overthrow the Kashmir Government. Mirza Afzal Baig, who was the Revenue Minister in the NC government and the founder of the Plebiscite Front (PF),⁶⁷ was also arrested. Baig and Abdullah were accused of treason, sedition, and subversion. During the trial in a statement before the Special Magistrate in Jammu, Baig asserted that 'the GOI dare not hold a plebiscite in the state ... they are bound to lose'.⁶⁸ The arrest of Abdullah resulted in a confrontation between the Indian military and the Kashmiri people, who were ruthlessly silenced.⁶⁹

As the incorporation process was in progress, the Kashmir Constituent Assembly adopted a resolution announcing the merger of Kashmir with India. In furtherance of that policy, a number of steps were taken by India to incorporate Kashmir into its union. Among other things, India forced the *Sadar-i-Riyasat* (head of the state) of Kashmir, Yuvraj Singh, to abdicate. India also started to construct a tunnel to give it better road access into Kashmir. In 1954, a Constitutional (Application to Jammu & Kashmir) Order⁷⁰ was promulgated

63 Palmer, (n 57) 158; Korbelt, (n 43) 241–42.

64 *The Times of India*, 11 August 1953.

65 Palmer, (n 57) 160–61.

66 Prem Nath Bazaz, *The History of Struggle for Freedom on Kashmir* (Kashmir Publishing Company 1954) 659.

67 Mss Eur F138/200: Papers of Sir John Gilbert Laithwaite, British Civil Servant 1919–59, The Trial of Kashmir, volume II, statement of Mirza Muhammad Afzal Beg, 1960 [BL].

68 *ibid*.

69 Khan, (n 19) 44.

70 C.O. 48, Published with the Ministry of Law Notification No. S.R.O. 1610, dated 14 May 1954. *Gazette of India* (extraordinary), Part II, Section 3, 821.

by the President of India. The Order was in contravention of the IOA as it empowered the Indian government to legislate on all matters on the Union list, not just on defence, foreign affairs, and communications.⁷¹ During that time, the nominated Prime Minister of Kashmir, Bakshi, offered the necessary legal validation for the integration process.⁷² The Presidential Order came into force on 14 May 1954, although Part II of this legislation was deemed to be applicable retrospectively from 26 January 1950. This retrospective application of Order 1954 caused legal controversy and raised questions with regards to its validity and legitimacy.⁷³

Pursuant to directives from the GOI, the new Constitution for Kashmir was approved by the Pro-Indian Government on 17 November 1956 and came into force on 26 January 1957. Section 3 of the Constitution of Jammu and Kashmir 1957 (CJK) stated that the State of J&K was an integral part of India.⁷⁴ Section 4 of the CJK stated that all the territory that had been under the control of the Maharaja on 15 August 1947 was now an integral part of India. It is important to point out that this assembly, its constitution, and its accession, were not recognised by the UN.⁷⁵ The CJK 1957 has been subjected to 29 amendments.⁷⁶ The legal effect of all these amendments was to further incorporate Kashmir into the Indian Union.

This was the beginning of the end of Article 370's special status; the provision has never been truly implemented in Kashmir. The Delhi Agreement 1952, which had confirmed that all powers except the three specified in the

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- 71 The Constitution (Application to Jammu and Kashmir) Order, 1954 superseded the Constitution (application to Jammu and Kashmir) Order 1950.
- 72 Sumantra Bose, *The Challenge in Kashmir – Democracy, Self-determination and a Just Peace* (Sage Publications 1997) 32.
- 73 Quoted in The Constitution (Application to Jammu & Kashmir) Order, 1954 (as cited in Anand, (n 31) 391).
- 74 The Constitution of Jammu and Kashmir, 1957.
- 75 FO371/129777: DY1041/46 (E): Outward Telegram from Commonwealth Relations Office to UK High Commissioner in Canada, Australia, India and Pakistan, 16 February 1957 [NAL].
- 76 First Amendment (A) in 1959, Second (A) in 1960, 3rd (A) 1961, 4th & 5th (A) in 1963, 6th & 7th (A) in 1965, 8th & 9th (A) in 1967, 10th (A) 1968, 11th (A) 1970, 12th (A) 1975, 13th (A) 1975, 14th (A) 1976, 15th (A) 1976, 16th (A) in 1977, 17th (A) in 1979, 18th, 19th & 20th (A) in 1987, 21st & 22nd (A) in 1989, 23rd & 24th (A) in 1997, 25th, 26th & 27th (A) in 1999, 28th (A) in 2000, 29th (A) in 2002. Also see Government of Jammu and Kashmir, Department of Law, Justice & Parliamentary Affairs <<http://jklaw.nic.in/historical.htm>> accessed 18 December 2016.

IOA would remain vested in the J&K government was also virtually annulled.⁷⁷ Consequent to the accession of Kashmir to India, the Order of 1954 defined the extent of the limitations on Indian sovereignty over the State of J&K. However, this constitutional order has been amended several times, starting in 1956.⁷⁸

In December 1971, there was a meeting between the then-PM of India, Mrs Indira Gandhi, and Abdullah. Abdullah insisted on the pre-1953 status of Kashmir⁷⁹ and the implementation of the Delhi Agreement 1952. Such requests were unacceptable to India. However, further negotiations with Abdullah, who was in jail and may have been coerced into accepting India's terms, resulted in the signing of the Kashmir Accord⁸⁰ in 1975. Afzal Baig, on behalf of Abdullah, signed this accord. The best that could be achieved by this accord was to keep Article 370. However, by that time Article 370 had already been encroached upon.

Nonetheless, this accord guaranteed freedom to the State of J&K in legislative matters. It was agreed that the Pro-Indian Government could re-evaluate the laws made by Parliament since 1953 and could decide which of them in its opinion, needed amendment or repeal.⁸¹ Unfortunately, these limited provisions of the Accord were never implemented. The key provisions of the Accord extended powers to India to make laws relating to:

[t]he prevention of activities directed towards disclaiming, *questioning or disrupting the sovereignty and territorial integrity of India or bringing about secession of a part of the territory of India from the Union* or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution.⁸² (Emphasis added)

It will be discussed in the legal assessment part of this chapter whether the incorporation process, which was completed through legislation to which

77 Bose, (n 72) 33.

78 C.O. 51, dated 11-2-1956. In 1958 C.O. 55 & 56 amended it. In 1959 and 1960 it was amended twice each year. It was further amended from 1961 to 1994, 36 times.

79 In pre-1953 situation the Government of India had control over only three key aspects of Kashmir governance – defence, foreign affairs and communications. See, Sheikh Abdullah's letter to G. Parthasarathi, reprinted in Abdul Jabbar Ganai, *Kashmir and National Conference, and Politics, 1975–1980* (Gulshan Publishers 1984).

80 Also called the Delhi Accord.

81 The Kashmir Accord, 1974, para 4.

82 *ibid* para 2.

the people of Kashmir did not consent, could validate the illegal Indian seizure.

Description of Democracy in Kashmir – A Legal Narrative

Before describing the democratic process in Kashmir, it is essential to mention that the Representation of the People Act 1950 and the Representation of the People Act 1951, which outline the election procedure in India, are not applicable to Kashmir. Surprisingly, Section 2(d) of the latter act was still enforced in Kashmir. Under this Act:

‘Election means an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State other than the State of Jammu and Kashmir’.⁸³

For Kashmir, the elections are only regulated under the Jammu and Kashmir Representation of People Act, 1957.

Phantom Democracy in Kashmir: A Saga of Rigged Elections and Marriages of Convenience

While the incorporation process was ongoing in Kashmir, no concepts or frameworks facilitating democratic elections were considered. When the first so-called Constituent Assembly was convened in 1951, the conditions for anarchy in the future administration of Kashmir began to take shape. All 71 members of the National Conference (NC) were declared to have been ‘elected unopposed’. This was Kashmir’s first election after accession. The nomination papers of all the candidates except the NC members were rejected.⁸⁴ The All Jammu and Kashmir Muslim Conference boycotted this election and the National Conference candidates being declared victorious without any balloting.⁸⁵

In 1953 when the leader of NC, Abdullah, was no longer required, he was jailed. This was followed by the rigged elections of May 1957, under

83 Section 2(d) of the Representation of the People Act, 1951 <<http://lawmin.nic.in/legislative/election/volume%201/representation%20of%20the%20people%20act,%201951.pdf>> accessed 10 December 2016.

84 Singh, (n 18) 12.

85 Brian Farrell, ‘The Role of International Law in the Kashmir Conflict’, [2002–2003] 21(2) Penn State International Law Review 293 at 301; Ali Khan, ‘The Kashmir Dispute: A Plan for Regional Cooperation’ (1994) 31 Colombia Journal of Transnational Law, 495 at 517.

Prime Minister Bakshi, who was famous for his 'pervasive corruption'.⁸⁶ Contemporaneous worries about election rigging can be found in a Dominion Office document held at the National Archives (London), in the form of a letter that the British High Commissioner in Delhi wrote on 6 July 1957 to the Commonwealth Office at Downing Street expressing concern that the press coverage of elections in Kashmir had not been good.⁸⁷ Further, the Manuscript European (Private Papers) held at the British Library in London show a rejoinder from President Ali Mohamed Naik of the All J&K Plebiscite Front in August 1961, in which he emphasised that Ashok Mehta of the *Praja* Socialist Party and Dr S.N. Peshin, President of *Yuvak Sabha*, had been forced to boycott polls. The *Martand*, the official body representing Hindus in Kashmir, said:

Forged votes were freely caste and voters were mercilessly beaten ... also 4 lakh [*4 hundred thousand*] people unanimously condemned [the] Assembly Election.⁸⁸ (Emphasis added)

The elections of 1962 were no different. Candidates from the ruling party, NC, ran unopposed in almost all areas and won 97 per cent of seats. The then-Prime Minister of India, Nehru, riled by the adverse reports in the international press, wrote to Bakshi advising him to lose 'a few seats' in future so that the image of the world's largest democracy would not be tarnished.⁸⁹ Soon thereafter Bakshi was removed from office, with S.M. Sadiq taking his place. Bakshi loyalists organised a no-confidence vote against the new Prime Minister. The GOI, in order to impede the motion, arrested Bakshi under the Defence of India Rules in 1964 and consigned him to the same prison where Abdullah had been incarcerated 11 years earlier.⁹⁰ Under Sadiq, who remained in power until his death in 1970, the incorporation process reached its peak. The designations of *Sadar-i-Riyasat* and Prime Minister were formally demoted to Governor and Chief Minister, as in any other Indian State. The Governor was no longer to be elected by JKCA but to be appointed by the GOI.⁹¹

86 Bose, (n 72) 32.

87 DO 35/5191: Dominions Office and Commonwealth Relations Office [NAL].

88 Mss Eur F138/201: Kashmir Problem True Side of Picture issued by Jammu and Kashmir Plebiscite Front, 1961 [BL].

89 MJ Akbar, *India, The Siege Within* (Penguin 1985) 258.

90 Bose, (n 72) 34.

91 *ibid* 35.

In 1970, Mir Qasim was installed as new Chief Minister of Kashmir. However, in 1975 he was unseated to make room for Abdullah.⁹² No elections were involved in the installation of Abdullah as Chief Minister. He had been in jail since 1953. In fact, his release and appointment as Chief Minister was part of an arrangement that was reached after he agreed to the terms of the Kashmir Accord. Abdullah's ever-faithful associate, Mirza Afzal Beg, signed the Kashmir Accord⁹³ on his behalf. In March 1977, Congress withdrew its support to the government led by Abdullah, resulting in the imposition of a three-month-long Governor's rule in the state under the governorship of L.K. Jha.

Elections were held in 1983. They were in no way peaceful, resulting in the death and injury of hundreds of people.⁹⁴ On 7 March 1986 the Indian Governor, Jagmohan, dismissed the new Chief Minister, G.M. Shah, on the grounds of corruption and inability to handle the growing political instability. It is to be noted that Shah had previously become Chief Minister with the assistance of the GOI when he succeeded in dismissing the government of Farooq Abdullah (son of Sheikh Abdullah) on 2 July 1984.⁹⁵ In the first 90 days of Shah's government, Kashmir remained under curfew for 72 days.⁹⁶ From March 1986, Kashmir was administered under Governor's rule, followed on 6 September 1986 by the imposition of a month-long period of Presidential rule. In late 1986, Farooq Abdullah (NC) concluded a rapprochement with the GOI and was installed as Chief Minister pending elections in March 1987.⁹⁷ These elections were rigged, resulting in an armed struggle against Indian rule that is still ongoing.⁹⁸ These facts expose the saga of political repression and fake democracy in Kashmir. Prime Ministers and Chief Ministers were tossed in and out and Indian governors were appointed to rule Kashmir, all under guises and ruses relating to elections and democracy.

By 1989, the political space in J&K was monopolised by India's draconian policies, resulting in a local rebellion. The revolt burst its banks and an armed

92 Singh, (n 18) 92.

93 Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Harvard University Press 2005) 88.

94 Sumit Ganguly, *The Crisis in Kashmir: Portents of War, Hopes of Peace* (CUP 1997) 84.

95 Balraj Puri, *Kashmir Towards Insurgency (Tracts for the Times)* (Orient Longman 1993) 36.

96 *ibid* 37.

97 Bose, (n 93) 93; Rajat Ganguly, 'Democracy and Ethnic Conflict' in Sumit Ganguly, Larry Diamond, & Marc F Plattner (eds), *The State of India's Democracy* (The Johns Hopkins University Press 2007) 54.

98 Staff, 'Governor's Rule Imposed', *Greater Kashmir* (Srinagar, 11 July 2008).

insurrection began, resulting in combat between militants and Indian army. On 19 January 1990, direct rule from India was imposed through a Governor appointed by the centre.⁹⁹ During Jagmohan's four-month-long rule, he adopted policies that were focused on breaking the culture of *Kashmiriyat* and suppressing the people. He was of the belief that 'as long as Kashmiri identity existed, Pakistan and America would continue to exploit it'.¹⁰⁰ He introduced the policy by which the percentage of Muslim candidates selected by the Subordinate Services Recruitment Board was brought down to nearly half.¹⁰¹ He also adopted other policies to divide the Kashmiri people based on their religion. In 1990, Jagmohan exhorted all Pundits in the valley to leave in order to facilitate an open front for dealing with the Muslim population with an iron fist.¹⁰² He also proposed using brutal military pressure to suppress Kashmiris claiming their right to self-determination.¹⁰³

On 25 May 1990, Jagmohan resigned and G.C. Saxena succeeded him. This was followed by Presidential rule, which was imposed on 19 July 1990 and continued until October 1996.¹⁰⁴ In 1996, an attempt was made to restore civil rule in Kashmir through the electoral process, subsequent to which the NC formed a government led by Farooq Abdullah. The elections, however, were not conducted fairly; the people were forced to vote under the shadow of a gun.¹⁰⁵ State elections were again conducted on 8 October 2002,¹⁰⁶ but, as expected, they were accompanied by boycotts and violence.

In the 2002 election, the NC lost power to the coalition led by the People's Democratic Party (PDP) and Congress. This election, like the previous ones, was marred by bloodshed,¹⁰⁷ vote rigging, and coercion by the security forces,

99 Staff, 'A Migrant Kashmiri Hindu Exposes the Conspiracy', *Daily Alsafa*, 18 September 1990.

100 Puri, (n 95) 36.

101 *ibid* 37.

102 Humra Quraishi, *Kashmir – The Untold Story* (Penguin Books 2004) 76; A Migrant Kashmiri Hindu Exposes the Conspiracy, *Daily Alsafa*, 18 September 1990.

103 Jagmohan, *My Frozen Turbulence in Kashmir* (Allied 1991); Patricia Ellis and Zafar Khan, 'Kashmiri Displacement and the Impact on Kashmiriyat' (2003) 12 *Contemporary South Asia* 523, 531; 'Summary Record of the 1161st Mtg: India, Malta' CERD/C/SR. 1161, 49th Session, 01/11/96, para 13.

104 Paul Bowers, *Kashmir* (International Affairs and Defence, House of Commons Library, Research Paper 04/28, 30 March 2004) 19.

105 *India: Human Rights Abuse in the Election Period in J&K*, AI Index; ASA 20/39/96, at 1; Staff, 'Soldiers Herd Kashmiris to Poll' *CNN*, 23 May 1996.

106 Election details for 2002 in J&K <www.eci.gov.in> accessed 1 February 2006.

107 Vanashree Samant, 'Free and Fair- Elections in Kashmir' (2003) 25 *Harvard International Review* 10, 11.

as well as militant violence.¹⁰⁸ The voting, which was spread over a month, allowed Indian authorities to move half a million local police and federal soldiers to guard the polling places in Indian-Occupied Kashmir.¹⁰⁹ In 2005 the leader of Congress, Ghulam Nabi Azad, was invited to lead the coalition government, which lasted until 7 July 2008. Azad's government collapsed after it cancelled its previously-issued land transfer order, by which 40 hectares of forest land were handed over to the Sri Amarnath Shrine Board (SASB).¹¹⁰ The SASB is a non-Kashmiri Hindu authority that supervises pilgrimages to a popular Amarnath shrine to the Hindu God Shiva in Kashmir.¹¹¹ The government cancelled the land transfer order when it provoked protests lasting more than ten days, which resulted in the deaths of five people and left 1,000 injured.¹¹² Kashmiris saw the land transfer order 'as a conspiracy to settle non-Kashmiri Hindus in the region to change the demography of the valley'.¹¹³ Chief Minister Azad revoked the land order on 2 July 2008 and submitted his resignation on 7 July 2008.¹¹⁴ Azad may have been asked to resign, as his decision to cancel the land transfer order to the Hindu organisation SASB was not seen to be in New Delhi's interests. In Kashmir, Pro-Indian Governments have found themselves out of office whenever their actions strayed from New Delhi's policies on Kashmir. The revocation of the land transfer to the SASB was seen as anti-Hindu by India, resulting in violent agitations¹¹⁵ by Hindu extremist parties like the BJP, *Bajrang Dal*, and *Shiv Sena*, which continue to commit violence against Muslims in Jammu.¹¹⁶ They also imposed an economic blockade against

108 Staff, 'Kashmir Embarks on Troubles Election' *BBC News* (London, 16 September 2002) <http://news.bbc.co.uk/1/low/world/south_asia/2260368.stm> accessed 15 July 2008; Amy Waldman, 'Kashmir Violence Increases as Election Nears' (*The New York Times*, 12 September 2002) <<http://query.nytimes.com/gst/fullpage.html?res=9AoDE3DD1231F931A2575ACoA9649C8B63>> accessed 15 July 2008.

109 Paul Watson, 'In Kashmir, Casting Ballots Can Be a Risky Endeavor' (*Los Angeles Times*, 16 September 2002) <<http://articles.latimes.com/2002/sep/16/world/fg-kashmir16>> accessed 15 July 2008.

110 NA Ganai, 'After 5 Deaths, 1,000 Injuries People Win' *Greater Kashmir* (Srinagar, 2 July 2008).

111 M Rahman, 'Muslim-Hindu Tension: Land Riots Bring Down Kashmir Coalition' *The Guardian* (London, 8 July 2008).

112 Staff, 'Kashmir Shrine Land Order revoked' *BBC News* (London, 3 July 2008) <http://news.bbc.co.uk/2/hi/south_asia/7483016.stm> accessed 10 October 2016.

113 *ibid.*

114 Ganai, (n 110).

115 Rahman, (n 111).

116 Faheem Aslam, 'Protest, Clashes Rock Srinagar', *Greater Kashmir* (Srinagar, 6 August 2008).

Kashmir, blocking the roads that took essential commodities in and out of the state.

The Pro-Indian Government, instead of tackling the crisis, watched as mute spectators.¹¹⁷ The resignation of Azad paved the way for Governor's rule to be imposed on Kashmir for the fourth time. The new Governor, N.N. Vohra, issued a proclamation through which he assumed with immediate effect all the functions of the government of the state.¹¹⁸ Acquiescing to the Hindu agitation, the new Governor appointed a four-member panel that restored 'exclusive' rights to the SASB to use 40 hectares of land in Kashmir.¹¹⁹ This has worsened the situation in Kashmir. Pro-independence demonstrations have become a daily norm, though people protest peacefully.¹²⁰ In the 2008 elections where the NC emerged as the largest party (with 27 out of 87 seats), voter turnout was surprisingly high despite the call for boycotts in the wake of the Amarnath controversy. The BJP gains (from 1 seat in 2002 to 11 in 2008) is said to have been a reaction among Hindus to the tensions stirred up by reactions to the SASB land transfer order.¹²¹

In May 2010, protests against the murder of three Kashmiri villagers and the subsequent attempts to brand the deceased 'terrorists' led to a brutal crackdown by the military in Indian-Occupied Kashmir. Curfews were imposed for long months, and stone-throwing protestors were met with gunfire.¹²² At least 120 people were killed in the streets.¹²³ While there was an attempt to soothe tensions in 2011, killings continued over the subsequent years.

117 Staff, 'Economic Blockade' *Greater Kashmir* (Srinagar, 7 August 2008).

118 Staff, 'Governor's Rule Imposed', *Greater Kashmir* (Srinagar, 11 July 2008).

119 Staff, 'Amarnath Land Row' *Hindustan Times* (New Delhi, 31 August 2008); Staff, 'Amarnath Land Row: J-K Govt', *Yahoo India News* (31 August 2008).

120 E Wax, 'Peaceful Protests in Kashmir Alter Equation for India' *Washington Post* (Washington D C, 27 August 2008); 'Demonstrations in Jammu and Kashmir' views of Margaret Moran, Labour MP for Luton South, 1 September 2008.

121 Rituparna Bhowmik, 'Verdict 2008: Jammu and Kashmir's "vote for democracy"?' *Reuters* (London, 28 December 2008) <<http://blogs.reuters.com/india/2008/12/28/verdict-2008-jammu-and-kashmirs-vote-for-democracy/>> accessed 15 October 2016.

122 Parvaiz Bukhari, 'Kashmir 2010: The Year of Killing Youth' (*The Nation*, 22 September 2010) <<https://www.thenation.com/article/kashmir-2010-year-killing-youth/>> accessed 20 November 2016.

123 Mirza Waheed, 'India is blinding young Kashmiri protesters – and no one will face justice' *The Guardian* (London, 18 July 2016) <<https://www.theguardian.com/commentisfree/2016/jul/18/india-blinding-kashmiri-protesters-justice-steel-pellets>> accessed 27 November 2016.

Comparing the 2008 and 2014 elections, there was a significant decrease for the NC (from 27 to 15 seats), another big increase for the BJP (from 11 to 17 seats), and a sizable increase for the PDP (21 to 28 seats).¹²⁴ 2014 was the year when the BJP swept to power in India.¹²⁵ The BJP is a fundamentalist Hindu nationalist party whose agenda contrasts deeply with the principles of democracy and secularism. Their communalist tactics have led to absurd atrocities such as 'beef murders' where Hindu nationalists kill Muslims due to their alleged claims of beef consumption.¹²⁶ The government's divisiveness has left them unable to deal with the world's largest democracy. This can also be seen in the PDP and BJP alliance, which started in 2015. To some, the news was a blow to the credibility of the PDP. The partnership, which was rocky from the start,¹²⁷ has come under severe strain in the face of recent events.

The recent unrest began with the death of a young rebel, Burhan Wani, at the hands of Indian troops. Mass independence protests have been ongoing since 8 July 2016. 23 people died in the first 3 days alone.¹²⁸ Other deaths, like the killing of an 11-year-old boy, led to the protests continuing throughout the subsequent months. Prem Shankar Jha, distinguishing these events from the reactions to the land transfer order in 2008, rape and double murder in 2009, or the fake encounter killings in 2010, has characterised them as an uprising rather than unrest. Prem Shankar Jha views these as part of a widespread and deeply felt reaction born out of decades of repression and a deep sense of betrayal among the Kashmiris who intervened to stop insurgency activities in the 1960s and 1990s. The movement in Kashmir calls for independence rather than a shift from India to Pakistan.¹²⁹

124 Staff, 'Jammu and Kashmir 2008 vs 2014' *Times of India* (Mumbai, undated) <<http://timesofindia.indiatimes.com/assembly-elections-2014/jk-2008-vs-2014/election2014vs2008/state-jnk.cms>> accessed 20 November 2016.

125 Staff, 'India Elections 2014' *The Guardian* (London, 16 May 2014) <<https://www.theguardian.com/world/2014/may/16/india-election-2014-results-live>> accessed 2 December 2016.

126 Indrani Basu, 'Six Outrageous Things BJP Leaders Have Said About Dadri Murder Over Beef' *Huffington Post* (New York, 6 October 2015) <<http://www.huffingtonpost.in/2015/10/01/six-outrageous-things-bjp-leaders-have-said-about-dadri-murder-o/>> accessed 2 December 2016.

127 Mehboob Jeelani, 'Mehbooba Mufti – are bel tamed?' *The Hindu* (Chennai, 8 September 2016) <<http://www.thehindu.com/news/national/pdpbjp-alliance-mehbooba-mufti-a-rebel-tamed/article8393847.ece>> accessed 2 December 2016.

128 Jon Boone, 'Kashmir death toll reaches 23 in protests at killing of rebel leader' *The Guardian* (London, 11 July 2016) <<https://www.theguardian.com/world/2016/jul/11/kashmir-death-toll-23-protests-shooting-burhan-wani-independence-violence>> accessed 26 November 2016.

129 Prem Shankar Jha, 'The Rise of Kashmir's Second "Intifada"' *The Wire* (New Delhi, 23 August 2016) <<http://thewire.in/61048/kashmir-uprising/>> accessed 2 December 2016.

In 2016, in order to stop the mass protests, Indian forces used pellet guns and caused the mass blinding of unarmed protestors.¹³⁰ The use of pellet guns was allowed based on a decision that it is a 'non-lethal' use of force.¹³¹ However, these pellet guns scatter 500 small steel pellets every time they are fired, and every one of those pellets can blind a person or cause other often irreversible damage.¹³² The PDP-BJP government made no attempt to address the anger felt among local Kashmiris, with the home minister facing derision for refusing to condemn the killings of civilians by government forces and talking instead about the insurgents' lack of *Kashmiriyat*.¹³³ In September 2016, the constant violence in Kashmir and ongoing human right abuses, along with the killing of 17 Indian soldiers by armed gunmen was compounded by the use of shelling and an intensification of the cross-border conflict with Pakistan,¹³⁴ raising fears about the mass displacement of around half a million people.

Parties Excluded from the Election Process – The Ban on the Plebiscite Front

The story of Kashmir's misgovernment by India¹³⁵ does not end with rigged general elections. The ban on the Plebiscite Front (PF) exemplifies not only the reality of elections, but also the fate of parties who seek the promised plebiscite. Afzal Beg, a member of the National Conference, founded the PF in 1955 to call for the undelivered promise of a plebiscite in Kashmir. This was a people's movement, fully endorsed by all the protagonists in the dispute as well as by the international community, including the UN. The main aim of the PF was to ensure the implementation of the Security Council resolutions calling for a plebiscite in Kashmir.¹³⁶ Abdullah was closely associated with

¹³⁰ Waheed, (n 123).

¹³¹ *ibid*.

¹³² Zacharie Rabehi and Kabir Agarwal, 'Blind in Kashmir with 100 pellets lodged in his-head' *Aljazeera* (Doha, 7 December 2016) <<http://www.aljazeera.com/indepth/inpictures/2016/11/blind-kashmir-100-pellets-lodged-head-161124075129498.html>> accessed 8 December 2016.

¹³³ Sushil Aaron, 'PM Modi's hardline Kashmir strategy suits BJP, but not India or the Valley' *Hindustan Times* (New Delhi, 7 September 2016).

¹³⁴ Staff, 'Fire exchanged across India-Pakistan border in Kashmir' *Aljazeera* (Doha, 10 November 2016) <<http://www.aljazeera.com/news/2016/11/deadly-cross-border-firings-india-pakistan-border-161109155002126.html>> accessed 16 November 2016.

¹³⁵ Geoffrey Robertson, *Crimes Against Humanity – The Struggle for Global Justice* (2nd edn, Penguin Books 2000) 166.

¹³⁶ Mss/Eur F138/200 [BL].

the PF and the movement had grassroots support everywhere, showing that the right to self-determination was a potent political instrument. In 1968, Abdullah was released from detention. He started to reiterate his calls for self-determination and, in May 1969, he announced that the PF would contest elections.¹³⁷

Abdullah and his PF movement, which sought self-determination for the State of Kashmir, decided to contest the mid-term parliamentary elections in March 1971.¹³⁸ This decision alarmed the GOI; they did not want to face a popular party contesting elections with a manifesto promise to hold a plebiscite.¹³⁹ The GOI responded by barring the PF from contesting in the election.¹⁴⁰ The Prime Minister of India, Mrs Gandhi, had more than 500 PF members arrested. The PF was charged with planning to use the forthcoming elections for parliament as a 'cover for subversion and for pro-Pakistan secessionist activities'.¹⁴¹ On 9 January 1971, invoking the Maintenance of Public Order Act, the Pro-Indian Kashmir Government banned Mirza Afzal Beg, the President of the PF, from entering Kashmir. On 10 January, Sheikh Abdullah and G.M. Shah, Secretary of the PF, were also exiled.¹⁴² The PF was described as an 'unlawful organisation' under the Unlawful Activities Prevention Act. A Foreign and Commonwealth Office document held at the British Library suggests that the union government justified the ban by accusing the PF of:

[a] claim to bring about the *secession* of a part of a territory of India, namely Jammu and Kashmir ... [through] self-determination for Kashmir by a *plebiscite*.¹⁴³ (Emphasis added)

137 Verghese Koithara, *Crafting Peace in Kashmir: Through a Realist Lens* (Sage 2004) 60; FCO 37/914: Letter dated 21 January 1971 from the Permanent Representative of Pakistan to the UN (A. Shahi) addressed to the president of the SC, 21 January 1971.

138 FCO 37/914: Letter dated 21 January 1971 from the Permanent Representative of Pakistan to the UN (A. Shahi) addressed to the president of the SC, 21 January 1971.

139 'Abdullah Barred by the Kashmiris' *The New York Times* (New York, 10 January 1971) 10. <http://www.nytimes.com/1971/01/10/archives/abdullah-barred-by-the-kashmiris-moslem-leader-given-order-while.html?_r=0> accessed 19 December 2016.

140 FCO 37/914: Letter dated 21 January 1971 from the Permanent Representative of Pakistan to the UN (A. Shahi) addressed to the president of the SC, 21 January 1971.

141 Abdullah Barred by the Kashmiris, (n 139).

142 FCO 37/914: Letter from British High Commissioner (Philippa Drew) New Delhi to J.A. Birch South Asian Department, FCO, London, 27 January 1971.

143 FCO 37/1340: Letter from British High Commission New Delhi to FCO London, dated 22 January 1973.

It appears that the GOI feared that if the PF was allowed to contest in the state elections, it might gain control of the Kashmir government. The banning of the PF demonstrates the attitude that the world's largest democracy has towards the issue of free and fair elections.¹⁴⁴ A model way to handle such a call for a plebiscite in a democratic country can be seen in the UK government's approach to the 2014 Scottish independence referendum,¹⁴⁵ where the secessionist Scottish National Party was able to freely voice their views and campaign for their cause. After Scotland decided to remain in the UK, no leaders of the movement were arrested and the SNP and other nationalists continue to voice their views freely.¹⁴⁶

Pro-independence parties in Kashmir are restricted from participation in the election process in another way. Under India's electoral laws, a person is not qualified to fill a seat in the State Legislature unless s/he makes an *oath of allegiance* to the constitution of India and affirms that they believe in the sovereignty and territorial integrity of India.¹⁴⁷ Under the Jammu and Kashmir Representation of People Act 1957, a similar provision is included in Section 51, and the failure to make the oath renders a nomination invalid.¹⁴⁸ The pro-independence parties in Kashmir recognise India as an occupier. As a matter of principle they have largely boycotted participation in the elections.

Consequences of the Unlawful Indian Constitutional Incorporation of Kashmir – A Review of the Breakdown of the Justice System in Kashmir

Violations of Civil and Political Human Rights

The political situation worsened and human rights violations increased after 1989¹⁴⁹ owing to the open insurgency demanding independence from Indian

¹⁴⁴ FCO 37/914, (n 142).

¹⁴⁵ Staff, 'Scottish independence referendum (Archived)' (*Gov.uk*, undated) <<https://www.gov.uk/government/topical-events/scottish-independence-referendum>> accessed 10 October 2016.

¹⁴⁶ Libby Brooks, 'Scottish independence: draft bill published on second referendum' *The Guardian* (London, 20 October 2016) <<https://www.theguardian.com/politics/2016/oct/20/second-scottish-independence-referendum-bill-published>> accessed 20 November 2016.

¹⁴⁷ Article 173 of the Constitution of India, 1950. See also Third Schedule to the Constitution of India, Forms of Oaths or Affirmations.

¹⁴⁸ Narendra Chapalgaonkar, *Law of Elections* (2nd edn, All India Reporter Pvt. Ltd 1999) 131.

¹⁴⁹ T McGirk, 'The Vicious Little War in India's Camelot' *Independent* (London, 17 September 1991) 7.

annexation. However to this day, India has always responded to such freedom demands with a massive crackdown against the people,¹⁵⁰ giving their military the power to kill on sight, resulting in the killing fields of Kashmir.¹⁵¹ Such atrocities take place despite the fact that India remains party to ICCPR and undertook to ensure that effective remedies were available to victims of human right abuses.¹⁵² There are around 700,000 Indian troops in Kashmir,¹⁵³ which is the largest ever soldiers-to-civilian ratio in any conflict in the world. The army remains involved in the commission of human rights violations, which include indiscriminate and extrajudicial killings, disappearances,¹⁵⁴ the use of human shields,¹⁵⁵ torture,¹⁵⁶ rape,¹⁵⁷ fake encounters,¹⁵⁸ massacres,¹⁵⁹ mass graves,¹⁶⁰ the

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- 150 'Kashmir's Torture Trail', Documentary Film by True Vision, 2012. (Producer: Adrian Levy & Cathy Scott-Clark, Director: Jezza Neumann, Executive Producer: Brian Woods) Broadcasted on Channel Four on 10 July 2012.
- 151 I Anjum, 'SAARC with Special Reference to Indo-Pakistan Trade Potential' (1997) 3(2) International Trade Law & Regulation 42, 42.
- 152 India became party to the ICCPR on 10 April 1979.
- 153 Rebecca Knuth, *Burning Books and Leaving Libraries-Extremist Violence and Cultural Destruction* (Praeger 2006) 77; Paul R Dettman, *Indian Changes Course-Golden Jubilee to Millennium* (Praeger 2001) 127; Observer News Service, 'Would you need 700,000 troops For 250 militants: Mirwaiz to GoI' *Kashmir Observer* (Srinagar, 31 May 2016) <<https://kashmirobserver.net/2016/local-news/would-you-need-700000-troops-250-militantsmirwaiz-goi-7027>> accessed 10 October 2016.
- 154 Fozia Nazir Lone, 'Those, Who Never Returned – A Legal Analysis on the Disappearances in Kashmir' (LLM Thesis, University of Aberdeen 2005); Zahir-ud-Din, *Did they Vanish in Thin air?* (Sabha Publications 1995).
- 155 Letter No SP 5Exg/267881 dated 14-4-1992 quoted in Public Commission on Human Rights, *State of Human Rights in Jammu and Kashmir 1990–2005* (Hindustan Printers 2006) 124.
- 156 See generally Majid A Siraj, *Kashmir, Desolation or Peace* (Minerva Press 1997) 78; Zahid Rafiq, 'In Kashmir, old torture centers get makeover' *The Christian Science Monitor* (Boston, 11 July 2012) <<http://www.csmonitor.com/World/Asia-South-Central/2012/0711/In-Kashmir-old-torture-centers-get-makeover>> accessed 19 December 2016; 'Kashmir's Torture Trail', (n 150).
- 157 See generally, Seema Kazi, 'Rape, Impunity and Justice in Kashmir', (2014) 10 Socio-Legal Review 14; The Kunan Poshpora rape incident (23 February 1991) occurred in the village of Kunan Poshpora (Kupwara District) during the Indian army search and interrogation operation. It is reported that about 100 women were raped. *Abdication of Responsibility: The Commonwealth and Human Rights* (Human Rights Watch 1991) 13–20; James Goldston & Patricia Gossman, *Kashmir under Siege: Human Rights in India* (Human Rights Watch 1991) 88–91; Asia Watch, *Kashmir under Siege* (May 1991) 73; Human Rights Watch & Physicians for Human Rights, 'The Human Rights Crisis in Kashmir' (1993) 14; Fozia Nazir Lone, 'Caught in Crossfire: Women, Conflict and Kashmir' (International Women's Day – Protecting and Promoting Women's Rights, Geneva, March 2013). For the Shopian rape and murder incident (29 and 30 May 2009 at Bongam, Shopian district abduction, rape

- and murder of two young women by Indian troops), see Altaf Hussain, 'Deaths provoke Kashmir protests' *BBC News* (London, 1 June 2009) <http://news.bbc.co.uk/2/hi/south_asia/8076666.stm> accessed 8 January 2017.
- 158 *Unreported World: Killing of Kashmir*, (n 17); Staff, 'Fake encounter Probe', *Greater Kashmir* (Srinagar, 12 February 2007); Altaf Hussain, 'Fake killings' return to Kashmir' (*BBC News*, 28 June 2010) <<http://www.bbc.com/news/10400074>> accessed 15 October 2016.
- 159 Such as, Gawkadal massacre (20 January 1990, 50 unarmed protestors shot dead by paramilitary troops of Central Reserve Force) Mir Ehsan, 'Kashmir's first blood' *Indian Express* (New Delhi, 1 May 2005) <<http://archive.indianexpress.com/oldStory/69437/>> accessed 8 January 2017; Hawal massacre (21 May 1990, 70 people were killed by army firing on the funeral procession of the Mirvaiz Molvi Mohammed Farooq, among the dead were five pregnant women) Shubh Mathur, *The Human Toll of the Kashmir Conflict Grief and Courage in a South Asian Borderland* (Palgrave Macmillan, 2016) 34. Bijbehara massacre (22 October, 1993, 51 unarmed Kashmiri protestors shot dead by the 74th Battalion Border Security Force) Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (I.B. Tauris 2003) 148; Zakoora and Tenggpora massacre (1 March 1990, 33 people killed and 47 injured by security forces); Goldston and Gossman, (n 157) 59–60; Sopore massacre (January 6 1993, in which 57 innocent civilians were shot dead by 94th Battalion of Border Security Force) 'Outcry in Delhi over Kashmir massacre' *Independent* (London, 8 January 1993) <<http://www.independent.co.uk/news/world/outcry-in-delhi-over-kashmir-massacre-1477194.html>> accessed 8 January 2017; Kupwara massacre (27 January 1994, the Indian army killed 27 civilians and injured 36 persons by random open firing) Shubh Mathur, *The Human Toll of the Kashmir Conflict Grief and Courage in a South Asian Borderland* (Palgrave Macmillan 2016) 34; Chittisinghpura massacre (20 March 2000, in the Anantnag district 40 unarmed Sikhs were shot dead by militant group some believe possibly related to Lashkar-e-Taiba. Mohammad Suhail Malik was arrested but he was later acquitted of his charges by a Delhi court. However, after several years, Clinton wrote that he believed the attacks were carried out by Hindu militants.) Quoted in Madeline Albright, *The Mighty and the Almighty – Reflections on America, God, and World Affairs* (Harper 2006) vi (as cited in Allard K. Lowenstein International Human Rights Clinic, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir* (Yale Law School 2009) 13; 'Killing of Sikhs clouds Clinton visit to India' *The Guardian* (London, 22 March 2000) <<https://www.theguardian.com/world/2000/mar/22/india.kashmir>> accessed 8 January 2017; *The 2010 Kashmir unrest* (June to August 2010, killing 112 civilians, injuring thousands) RFI, 'Kashmir protests intensify after 11-year-old killed' (*RFI*, 31 August 2010) <<http://en.rfi.fr/africa/20100831-protests-intensify-after-11-year-old-killed>> accessed 8 January 2017); *The Ramban firing incident* (18 July 2013 in Ramban district, 4 people were killed and 44 injured. The incident refers to the shooting on a protesting crowd of Kashmiri people by Indian Border Security Forces) 'Kashmir police and protesters clash after killings' (*BBC News* 19 July 2013) <<http://www.bbc.com/news/world-asia-india-23370980>> accessed 8 January 2017; *The 2016 Kashmir unrest* (started after the killing of Burhan Wani, a militant commander of the Kashmir-based Hizbul Mujahideen by Indian security forces on 8 July 2016 and lasted until December 2016. Protest started in all 10 districts of the Kashmir Valley followed by government's imposition of 55 days of continuous curfew in all 10 districts of the valley,

destruction of businesses and residential properties,¹⁶¹ setting fire to residential districts,¹⁶² and the occupation of school¹⁶³ and university buildings.¹⁶⁴ All these human rights violations are well documented by Human Rights Watch,¹⁶⁵

the suspension of mobile services, the killing of more than 85 unarmed civilians, the injuring of 13,000 civilians, and more than 500 civilians, mostly children, partially or totally lost their eye sight. There were several incidents of border shelling between India and Pakistan). News Desk, 'Amnesty proposes ban on pellet guns in Kashmir' (*The Express Tribune*, 5 August 2016) <<http://tribune.com.pk/story/1156265/amnesty-proposes-ban-pellet-guns-kashmir/>> accessed 8 January 2017; 'Kashmir clashes: Indian shelling kills nine on bus' (*BBC News*, 23 November 2016) <<http://www.bbc.com/news/world-asia-india-38074202>> accessed 8 January 2017. Public Commission on Human Rights, (n 157) 180.

- 160 The Special Rapporteur was informed that a total of 2,700 unmarked graves containing over 2,943 bodies have been discovered, some of these graves containing more than one body. While the Government expressed its intention to conduct investigations into unmarked graves, this has not yet been done. See Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (UN Doc:A/HRC/23/47/Add.1), 26 April 2013, 17 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf> accessed 15 December 2016 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013); Agana P Chatterji, Parvez Imroz, Gautam Navlakha, Zahir-Ud-Din, Mihir Desai and Khurram Parvez, *Buried Evidence: Unknown, Unmarked and Mass Graves in Indian-Administered Kashmir, a Preliminary Report* (International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir 2009) <<http://www.kashmirprocess.org/graves>> accessed 15 July 2016; APDP, *Facts under Ground. A Fact Finding Mission on Nameless Graves and Masked Graves in Uri area 2008* (Association of Parents of Disappeared Persons, 2008) <<http://www.jkccs.net/wp-content/uploads/2015/02/Facts-Under-Ground-First-Report-on-Mass-Graves-in-Kashmir.pdf>> accessed 15 October 2016.
- 161 Robert G Wirsing, *India, Pakistan and the Kashmir Dispute* (St. Martin's Press 1994) 157–58.
- 162 Staff Report (Dundee), 'Kashmir 1991: Health Consequences of the Civil Unrest and the Police and Military Action' (*Physicians for Human Rights (UK)*, 1991) 13–14.
- 163 More than 46 schools have been occupied by army depriving the children of their education. See Public Commission on Human Rights, *State of Human Rights in Jammu and Kashmir 1990–2005* (Hindustan Printers 2006) 38.
- 164 MF Aslam, 'University Academics Revolt against Police occupation of Building', *Greater Kashmir* (Srinagar, 23 June 2007).
- 165 Staff, *Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir* (Human Rights Watch, 11 September 2006) vol 18, no 11(c) <<https://www.hrw.org/report/2006/09/11/every-one-lives-fear/patterns-impunity-jammu-and-kashmir>> accessed 15 October 2016.

Amnesty International,¹⁶⁶ Physicians for Human Rights,¹⁶⁷ and indigenous human rights organisations, such as the Coalition for Civil Societies.¹⁶⁸ Further, the draft report *Present Situation and Future Prospects of Kashmir* prepared by Emma Nicholson of Winterbourne MEP, for consideration by the European Parliament, deplored the human rights violations by the Indian armed forces and the all-too-frequent incidents of terror and violence perpetrated by armed militant groups.¹⁶⁹ It is estimated that the open insurrection from 1989 has left more than 80,000 people dead,¹⁷⁰ created 2.05 million displaced people,¹⁷¹ and resulted in the disappearance of more than 8,000 people after their arrest by the Indian army.¹⁷² According to the 'Report of the Special Rapporteur on extrajudicial, summary, or arbitrary executions' prepared after an official visit to India from 19 to 30 March 2012, it was concluded that official data suggests that between 1988 and 2009, 42,657 people died in the conflict in Jammu and Kashmir.¹⁷³ Other sources suggest the number of deaths is approximately 80,000.¹⁷⁴ Apart from the army, who are at their behest, the Nominated

166 Staff, *India: Abuse of the PSA in Jammu and Kashmir* (Human Rights Watch, 5 April 2000); Amnesty International, AI Index ASA 20/13/00.

167 Staff Report (Dundee), (n 162) 13–14.

168 Public Commission on Human Rights, (n 155) 124; S Kak (Director), *Jashn-i-Azadi (Celebrating Freedom)*, Documentary on Kashmir, 2007.

169 Baroness Nicolson of Winterbourne (Rapporteur), 'Report: On Kashmir: present situation and future prospects (2005/2242(INI))', 25 April 2007, Committee on Foreign Affairs, European Parliament Session Document Final A6-0158/2007 <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0158+0+DOC+PDF+Vo//EN>> accessed 15 October 2016.

170 Satinder Bindra, 'Terror Group Warning' (CNN, 4 February 2002) <<http://edition.cnn.com/2002/WORLD/asiapcf/south/02/04/india.kashmir/index.html>> accessed 15 October 2016.

171 Public Commission on Human Rights, (n 155) 38.

172 K Barker, 'In Kashmir, People Vanish, Residents Allege Indian Agents Grab many Innocents', *The Chicago Tribune* (Chicago, 2 February 2002). An investigation by the Association of Parents of Disappeared Persons (APDP) uncovered 940 unnamed graves. See APDP, (n 160).

173 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (UN Doc:A/HRC/23/47/Add.1), 26 April 2013. <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf> accessed 15 December 2016 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013).

174 Grace Pelly, *State Terrorism: Torture, extra-judicial killings and forced disappearances in India* (Human Rights Law Network 2009) 132.

Government has a special militia comprised of surrendered militant groups, including the Special Operations Group (SOG) and Special Task Force (STF). These militias are Government-sponsored gunmen (also called *Ikhwanis*) who are involved in human rights abuses including the use of brutal force¹⁷⁵ as well as corruption.¹⁷⁶

The violation of human rights is the result of high-level political interference from the GOI through the Nominated Government. International organisations, such as the International Committee of the Red Cross (ICRC), are not permitted to carry out any of their protection and medical services in Kashmir.¹⁷⁷ Since 1993, India has not allowed the UN's special rapporteur for torture to visit Kashmir despite the fact it is signatory of the UN Convention against Torture.¹⁷⁸ Limited access was granted to the ICRC in the late 1990s on the basis of the Memorandum of Understanding (MOU) that the organisation signed with the GOI.¹⁷⁹ Under the MOU, the ICRC is only allowed to monitor the conditions of detainees within its restricted mandate.¹⁸⁰ The ICRC has agreed to keep certain reports regarding detainees confidential, as this was the only possible way to gain access to prisons.¹⁸¹ Available reports from the ICRC suggest that for each case, the ICRC regional delegation in New Delhi has to obtain special permissions to access the detainees that are of concern to the organisation.¹⁸² Due to this restriction, the ICRC is usually left with conducting seminars on subjects like the 'health of the detainees in prison'¹⁸³ or providing courses on 'International Humanitarian Rights' to the Indian security forces.¹⁸⁴

175 J&K SHRC, *Annual Report for 2005–2006* (Government Press 2007) 21.

176 Staff, *India's Secret Army in Kashmir, New Patterns of Abuses Emerge in the Conflict* (Human Rights Watch, July 1999) vol 8, no 4(c), May 1996; HRW vol 11 no 4(c), 33–34; S Bose, 'Kashmir at the Crossroads: Problems and Possibilities' in SK Das (ed), *Peace Processes and Peace Accords* (Sage 2005) 142, 168.

177 Human Rights Watch, (n 165).

178 Rafiq, (n 156).

179 Vinicius Souza, 'Kashmir: Occupied, Partitioned and Disputed' (Worldpress.org, July 2004) <<http://www.worldpress.org/Asia/1949.cfm#down>> accessed 21 July 2015.

180 Staff, 'ICRC presence in JK Meaningless: APDP', *Greater Kashmir* (Srinagar, 25 April 2007).

181 Souza, (n 179).

182 Staff, 'ICRC Annual Report 2005: Regional Delegation in New Delhi' (ICRC, 1 June 2006) 201.

183 Staff, 'ICRC Annual Report 2007: Regional Delegation in New Delhi' (ICRC, 27 May 2008).

184 Souza, (n 179).

In 2012, for the first time, India allowed the Special Rapporteur on extrajudicial, summary, or arbitrary executions to visit Kashmir. In his report Special Rapporteur Mr Christof Heyns, generally concluded:

...the level of extrajudicial executions in this country still raises serious concern. This includes deaths resulting from excessive use of force by security officers, and legislation that is permissive of such use of force and hampers accountability ... Concerns have been voiced to the Special Rapporteur on unmarked graves found in Jammu and Kashmir containing bodies of victims of extrajudicial executions from the 1990 to 2009 period ... While the Government expressed its intention to conduct investigations into unmarked graves, this has not yet been done.¹⁸⁵

In order to suppress the self-determination of Kashmiris, unjust and harsh laws were transported into Kashmir with the approval of the Nominated Government. Laws that would increase the legal protection of Kashmiris are restricted or excluded from application in Kashmir. For instance, the National Commission for Minorities Act 1992 (NCM)¹⁸⁶ and Indian Right to Information Act 2005, are barred from their application in Kashmir. Laws like the Jammu and Kashmir Right to Information Act 2004,¹⁸⁷ Public Records Rules 1997,¹⁸⁸ and the Protection of Human Rights Act (PHRA) 1993¹⁸⁹ are applied to Kashmir with restrictions. It is extraordinary that even fundamental rights have restricted application in the State of J&K. The new CJK 1956 does not contain fundamental rights though Section 10 technically entitles

185 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (UN Doc:A/HRC/23/47/Add.1), 26 April 2013. <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf> accessed 15 December 2016 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013).

186 Section 1(ii) of the NCM Act 1992.

187 Section 8 of this Act does not apply to the intelligence and security organisations. See Fozia Nazir Lone, 'Information Held Prisoner: Freedom of Information & Public Records Act' (2007) 2(4) Kashmir Affairs 62, 65–66.

188 Section 11(iii) of the Public Records Rules 1997. See PK Das, *The Right to Information Act 2005* (Universal Law Publishing Co, Delhi 2006) 76. No access is given to review the archival material on Kashmir after the year 1924 in the National Archives of India. See *ibid*.

189 Section 1(2) PHRA 1993.

Kashmiris to 'all the rights guaranteed to them under the Constitution of India'. However, as discussed earlier, under the Delhi Agreement 1952, fundamental rights are applied with restriction and modification to Kashmiris under the COI.¹⁹⁰

*The Collapse of the Human Rights Protection System – The
Incorporation of Draconian Laws and the Weak Kashmiri Judiciary*

The Pro-Indian Government, apart from assisting the GOI to incorporate Kashmir constitutionally into its Union, has pursued aggressive Indian policies that have degraded the fundamental rights of the people of Kashmir.¹⁹¹ The Pro-Indian Government has approved the application of draconian laws¹⁹² like the Armed Forces (Jammu and Kashmir), Special Powers Act 1990 (AFSPA), and Jammu and Kashmir Public Safety Act 1978 (JKPSA). These laws are playing havoc in the State and were introduced despite the 44th Amendment to the COI, which ruled out the suspension of the writ of *habeas corpus*, the right to life and due process.¹⁹³ This shows that the COI does not guarantee individual liberty, as it allows to be subverted through the rhetoric of security. In Kashmir these special security laws are in force without a declared emergency. Judicial remedies, especially *habeas corpus*, remain illusory.¹⁹⁴ The most notorious and harsh law in force is the AFSPA 1990,¹⁹⁵ which was introduced by Governor Saxena.¹⁹⁶ Under Section 4(a)–(d) of this act, even a non-commissioned officer has the power to shoot and kill persons acting in contravention of any law or order (a subjective requirement, as there is no need for a trial before issuing such a death sentence) in a disturbed area, as well as arrest persons and search premises without a warrant.¹⁹⁷ Section 6 requires that persons who are arrested

190 Anand, (n 31) 202.

191 Sikander Shah, 'An In-Depth Analysis of the Evolution of Self-Determination Under International Law and the Ensuing Impact on the Kashmiri Freedom Struggle Past and Present' (2007) 34 Northern Kentucky Law Review 29, 47.

192 The Jammu & Kashmir Disturbed Areas Act, 1992.

193 Ashok Agrawal, *In Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990–2004* (SAFHR Paper Series 17, Kathmandu 2008).

194 Nitya Ramakrishnan, *In Custody – Law, Impunity and Prisoner Abuse in South Asia* (Sage 2013) 20.

195 The Armed Forces (Special Powers) Act 1958 was extended to Kashmir in 1990 and came into force on 5 July 1990.

196 Schofield, (n 159) 171.

197 The Armed Forces Special Powers Act, 1990.

along with any property seized should be taken to a police station with 'the least possible delay', which is a subjective requirement open to abuse. To cap it all off, Section 7 of AFSPA protects armed forces from liability for deaths, illegal arrests, and other violations by requiring consent from the Indian government before any prosecution can be brought for people who claim to have been acting under powers conferred on them by the Act.

Under Sections 8 and 18 of the JKPSA 1978, a detainee may be held under administrative detention for a maximum of two years without a court order on vaguely defined grounds.¹⁹⁸ Under this legislation, people can be detained simply for expressing a political opinion or suggesting that there should be a plebiscite conducted to determine the status of Kashmir. This pattern of arrests has given rise to an era of harassment, intimidation, disappearances, and deliberate disregard for the civil and political rights of the people of J&K.¹⁹⁹ Under Section 10, the Government has complete discretion about the places and conditions of detention, and the movement between places of detention. Under Section 22 of this act, legal proceedings are prohibited against officials acting 'in good faith' who did or intended to do something in pursuance of the Act. At least 16,329 have been detained under this act as of 2014, per the government's own admission.²⁰⁰ Clearly, the superficiality of Indian democracy is demonstrated by the state's proneness to resort to these security laws rather than political solutions in regions where people are alienated by the state's own policies.²⁰¹

In a judicial review case involving a similar act, the Armed Forces (Special Powers) Act 1958, the Supreme Court of India upheld provisions similar to those applied to Kashmir, remarking that the powers given to the armed forces under the act were not unreasonable or arbitrary, including the right of non-commissioned officers to shoot and kill.²⁰² The court also stated that the fact

198 *Abdul Aziz v. State of J&K and Others* (2001) 1 J & K Law Reporter 76; *Gulzar Ahmed Kuchay v. State of J&K & Ors* HCP No 16/2005; Date of Decision 12-08-2005 (763-65) *SLJ* Vol. 11 (July to Dec) 2005; *Aqueel Ahmed v. State & Ors* HCW 966 of 2003 [2005 (2) JKJ 47(HC)], decided on 10.09.04, para 11.

199 HRW, *India: The J&K Public Safety Act – A Threat to Human Rights* (2000) AI Index: ASA 20/019/2000, 1.

200 Staff, *'DENIED' Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir* (Amnesty International 2015) 15 <<https://www.amnesty.org/en/documents/asa20/1874/2015/en/>> accessed 20 November 2016.

201 Ramakrishnan, (n 194), 20.

202 *Naga People's Movement of Human Rights Vs Union of India* (1998), 2 SCC 109, 24 <<http://judis.nic.in/supremecourt/imgsl.aspx?filename=13628>> accessed 19 December 2016.

that prosecutions could not be brought under the act without the approval of the Central government was not problematic, as it should not be assumed that the government would abuse its discretion. Its only concession was that individual decisions not to prosecute could be open to judicial review.²⁰³ However, the report of 2013 by UN Special Rapporteur on extrajudicial, summary, or arbitrary executions (Mr Christof Heyns) expressed concern over AFSPA and recommended:

India should repeal, or at least radically amend, AFSPA and the Jammu and Kashmir AFSPA, with the aim of ensuring that the legislation regarding the use of force by the armed forces provides for the respect of the principles of proportionality and necessity in all instances, as stipulated under international human rights law. It should also remove all legal barriers for the criminal prosecution of members of the armed forces.²⁰⁴

Draconian laws have virtually handicapped the Kashmiri judiciary, which are unable to protect people against human rights violations. The Kashmiri judiciary operates a within very sensitive conflict situation, where executive and military prerogatives are regarded as sacrosanct.²⁰⁵ For this reason both the court system as well as the legal process for victims who are seeking remedies for human rights violations clearly fall short of international legal standards.²⁰⁶ In most human rights cases the security forces are involved and the Kashmir courts have no power to prosecute them and, hence, judicial enquiries are routinely undermined.²⁰⁷ Oftentimes, Kashmiri police refuse to file the First Information Reports and even after the victims file the *mandamus* petition in the High Court (which compels the police to file an FIR) nothing much can be expected. This is because without the sanction of the federal

203 *Naga People's Movement of Human Rights Vs Union of India* (1998), 2 SCC 109, 27 <<http://judis.nic.in/supremecourt/imgsl.aspx?filename=13628>> accessed on 19 December 2016.

204 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (UN Doc: A/HRC/23/47/Add.1), 26 April 2013, para 100 <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf> accessed 15 December 2016 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013).

205 Allard K. Lowenstein International Human Rights Clinic, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir* (Yale Law School 2009) 3.

206 *ibid.*

207 *Basharat Case*, J&K High Court under HCP No. 896/1991; Amnesty International, AI Index: ASA 20/02/99, 31.

government, the police are powerless to arrest or prosecute security forces accused of committing human rights abuse.²⁰⁸ In the handful of cases where the High Court of Kashmir found the army or other security forces were involved in the commission of human rights abuses, no action was taken as the central government's approval was required and such requests to the central government are either ignored or denied after several years.²⁰⁹ This demonstrates the failure of the Kashmiri judicial system both at a structural as well as operational level.²¹⁰ As stated above, the GOI has complete discretion in deciding whether army personnel will be prosecuted. In 300 cases where the GOI's permission to prosecute was sought, it was found that not a single approval²¹¹ was given. No permission was given to start a trial against security personnel.²¹² In 50 cases, judicial enquiries were set up through J&K High Court directives. In each case, the disappearances were the direct responsibility of various army units.²¹³ In July 1997, while examining India's third periodic report the UNHRC observed that:

The requirement of prior sanction of Union Government to prosecute the security forces contributes to a climate of impunity and deprives the people of remedies to which they are entitled.²¹⁴

Furthermore, judicial delays prevent victims from obtaining an effective remedy.²¹⁵ For instance, in the *Naseema* Case, investigations started in 1993 but the case was still pending in 2009.²¹⁶ It is also common practice in Kashmir for detainees not to be released despite High Court orders.²¹⁷ In fact, to prevent

208 Allard K. Lowenstein International Human Rights Clinic, (n 205) 9–10.

209 In the case of Jalil Andrabi (lawyer and human rights activist), the J&K High Court completed the enquiry proving that Major Avtar Singh of 35RR battalion of Indian Army first disappeared and later killed Jalil Andrabi. See HRW, vol 11, no 4(c), July 1999 at 5; Allard K. Lowenstein International Human Rights Clinic, *ibid.*, 13.

210 Allard K. Lowenstein International Human Rights Clinic, *ibid* 4.

211 *ibid* 13.

212 H Zainagiree, 'No Coercion from UJC' *Greater Kashmir* (Srinagar, 15 February 2008).

213 Amnesty International, AI Index: ASA 20/02/99, 31 at 42.

214 CCPR/C/60/IND/3, para 21.

215 Allard K. Lowenstein International Human Rights Clinic, (n 205) 18.

216 Quoted in OWP No. 896/2006 (as cited in *ibid* 18).

217 Quoted in *Nur Mohammed Kalwal* Case (as cited in Public Commission on Human Rights, (n 155) 163).

release and to circumvent court orders, detainees are routinely pre-emptively rearrested or arrested immediately after release on a fresh preventive detention order on grounds that are the same or similar to the original order.²¹⁸ The immediate arrests and detention on grounds that are verbatim copies of the original invalidated detention orders suggest that the detaining authority is acting with contempt for the law.²¹⁹

The National Human Rights Commission (NHRC)²²⁰ has very limited access in Kashmir and can only make recommendations to the government. Likewise, the State Human Rights Commission (SHRC), which was set up under the J&K Protection of Human Rights Act 1997, is precluded under Section 13 from '*enquir[ing] into allegations of abuses committed by armed or paramilitary forces or any other central agency*'. This makes SHRC an ineffective and woefully feeble protector of human rights in Kashmir. The SHRC has limited powers and can at best, under SRO 43, entitle the family of the victim (especially in the cases of killings) to *ex-gratia* relief or provide government employment to one member of a family.²²¹ These reparatory gestures amount to very little, and people are routinely deprived of remedies to which they are entitled under international human rights standards.

The Construction of Multi-layered Electrified Barbed Fences: Restrictions on the Right to Freedom of Movement

Multi-layered barbed wire rolls are used all over Kashmir inside every nook and cranny of cities and villages and all along the perimeter of borders and along the Line of Control (LoC).²²² The multi-layer fencing in Gurez (Kashmir) has cordoned villages off from each other and residents have to go through checkpoints. The barbed wire surrounding the bunkers and fortified positions on Kashmir's main roads²²³ significantly encroach on the right of way of the road users. About 250 km of electrified barbed wire built to around 10 feet high has been used to reinforce the division of Kashmir along the LoC, and cuts through

218 Allard K. Lowenstein International Human Rights Clinic, (n 205) 37.

219 *Naba Lone v District Magistrate* 1988 SLJ 300.

220 This commission was constituted under the Protection of Human Rights Act, 1993.

221 J&K SHRC, (n 175) 21.

222 Soutik Biswas, 'Indian Army Wary of Open Border' *BBC News* 24 (21 October 2005) <http://news.bbc.co.uk/2/hi/south_asia/4359914.stm> accessed 15 October 2016.

223 Vernon Hewitt, *Towards the Future? – Jammu and Kashmir in the 21st Century* (Granta Editions 2001) 166–67.

farms and²²⁴ villages, separating families and dividing people between India and Pakistan.²²⁵ This restricts or outright prevents free movement and causes injuries and deaths. The general masses are watched over by the army from beyond the fences.²²⁶ The fencing has also forced thousands of families to migrate from the areas near the LoC.²²⁷

The construction of the multi-layer fencing at numerous places in Kashmir does not conform to international law and has human rights implications. The fencing restricts the freedom of movement and is an impediment in the exercise of other rights, like the rights to livelihood, health, and education. These villages are literally isolated and their agricultural land has been divided by the fencing.²²⁸ In the Advisory Opinion of the ICJ on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,²²⁹ the Court confirmed that the construction of a dividing wall restricts the right to freedom of movement provided under Article 12(1) of ICCPR, which provides that 'Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence'.²³⁰

The fencing is also illegal in terms of humanitarian law, as India has failed to provide concrete reasons, including any military exigency, for the construction of electrified fencing. The ICJ, reflecting on the applicable international humanitarian law on the construction of a wall in the occupied territory of Palestine, observed there are provisions that can enable action on the part of the occupying power in case of military exigencies. However, the court affirmed that neither Article 46 of The Hague Regulations of 1907 nor Article 47 of the Fourth Geneva Convention contain any qualifying provisions with

224 Athar Parvaiz, 'India: Kashmir's Fence Eats Crops', *Inter Press Service* (31 October 2011. Available at) <<http://www.ipsnews.net/2011/10/india-kashmirs-fence-eats-crops/>> (accessed on 1 December 2016).

225 For a recent analysis, see Staff, 'Kashmir conflict: Tension on the India Pakistan border' *BBC News* (1 October 2016) <<http://www.bbc.com/news/world-asia-37531900>> accessed 15 October 2016.

226 Staff, 'No Man's Land: Border Fencing Isolates J&K Villages, Agriculture land of three villages has also been divided by fencing' *The Times of India* (Mumbai, 12 October 2003).

227 NN Khan, 'Human Rights Violations and Right of Self-Determination of Kashmiri People in the Light of Historical Facts' *AHRC HK* (Kashmir, 24 January 2002).

228 Staff, 'No Man's Land: Border Fencing Isolates J&K Villages, Agriculture land of three villages has also been divided by fencing' *The Times of India* (Mumbai, 12 October 2003).

229 Advisory Opinion of 9 July 2004, ICJ Rep. 136.

230 *ibid* 135–36.

regard to the construction of a wall.²³¹ Keeping in view this advisory opinion of the ICJ, it is clear that India is in violation of its international legal obligations by erecting and maintaining multi-layer fencing in every nook and cranny of Kashmir. In particular, the construction of multi-layer fencing at different places in Kashmir is unlawful under both international human rights and humanitarian law.

Violations of Economic Human Rights

The notion of economic self-determination allows peoples to assert control over their own natural resources, which encourages democratic participation. As such, under international law, a national government is expected to exploit natural territorial resources for the profit of the local people.²³² Besides, in relation to occupied regions, it is also accepted that an occupying power is not allowed to threaten the occupied people's natural resources.²³³ Article 53 of IV Geneva Convention 1949 states:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or co-operative organizations, is prohibited...²³⁴

Article 22 of The Universal Declaration of Human Rights (UDHR)²³⁵ advocates the economic self-determination of peoples, which enables peoples to participate in decision-making regarding the use of their resources. Article 1 of ICESCR states that the people have the right to utilise their natural wealth and resources for their own requirements.²³⁶ The UN has also called for the

²³¹ *ibid* 135–36 at para 135.

²³² Declaration on the Establishment of a New Economic Order, GA Res. 3201 (S-VI) 13 I.L.M. (1974) 715, para 4(2) (e) & The Charter of Economic Rights & Duties of States GA Res. 3281 (XXIX) 14 I.L.M. (1975) 251.

²³³ Resolution 59/251, 22 December 2004, paras 6–7.

²³⁴ Geneva Convention Relative to The Protection Of Civilian Persons in Time of War 12 August 1949.

²³⁵ 'Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality'.

²³⁶ See also International Labour Organization, Convention 169, Indigenous and Tribal Peoples Convention (Entry into force: 5 Sep 1991) <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 13 December 2016.

permanent sovereignty of peoples and nations over their natural wealth and resources.²³⁷ The resolution on 'Permanent sovereignty over natural resources' declares that:

'The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned' (Sec. 1) and that 'Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace'.(Sec. 7)²³⁸

Traditionally, economic self-determination was associated with anti-colonialism. However, in contemporary times the people are accepted as the legal holders of their natural resources and the shift of focus to the new international economic order of the "North/South" Divide²³⁹ may have contributed to this development. With the development of international law in the post-colonial era various international documents, treaties, and declarations were formulated to recognise the right to specific natural resources such as water,²⁴⁰ the use of land/property,²⁴¹ territorial seas,²⁴² etc. This is mainly

237 Resolutions 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1952; 1314 (XIII) of 12 December 1958; Resolution 1515 (XV) of 15 December 1960; General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources'.

238 Sections, 1 and 7 of General Assembly Resolution 1803 (XVII) of 14 December 1962, 'Permanent sovereignty over natural resources'.

239 J Oloka-Onyango, 'Heretical Reflections on the Right to Self-determination: Prospects and Problems for a Democratic Global Future in the New Millennium' (1999) 15 *American University International Law Review* 151, 169–77.

240 Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), UN Doc. E/C.12/2002/11 (2002).

241 The Vancouver Declaration on Human Settlements, UN Conference on Human Settlements, Adopted June 11, 1976, General Principles: Land; Voluntary Guidelines of the Food and Agriculture Organization of the United Nations (FAO), adopted 127th Session of the FOA Council, November 2004, Guideline 8B (Access to resource and assets: Land); Pinheiro Principles. UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005). See also Elisabeth Wickeri & Anil Kalhan, 'Land Rights Issues in International Human Rights Law', *Institute for Human Rights and Business* <https://www.ihrb.org/pdf/Land_Rights_Issues_in_International_HRL.pdf> accessed 13 December 2016.

242 United Nations Convention on the Law of the Sea of 10 December 1982 (PART 11 – Territorial Sea and Contiguous Zone – arts 2–16); UN Declaration on the Rights of Indigenous Peoples,

because securing access to natural resources shapes the people's social, economic, and political lives and is pivotal for the full enjoyment of citizenship rights, as well as human rights in general.²⁴³

For instance, with the adoption of the General Comment 15 by the ICESCR, the right to water has been accepted as a human right on the basis that it is indispensable for leading a life with dignity.²⁴⁴ In fact, the right to water has been recognised in various international documents, including treaties and declarations.²⁴⁵ Further, the Declaration on the Rights of Indigenous Peoples specifically recognises that indigenous peoples have the 'right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard'.²⁴⁶ Further, Article 32 (1) specially states that indigenous peoples have the right to determine and develop strategies for the development/use of their lands/territories and other resources. Article 32(2) states that the prior informed consent of indigenous peoples is necessary for any project that affects their water resources.²⁴⁷

2007, URL: <<http://www.un.org/esa/socdev/unpfii/en/drip.html>>. Convention on Biological Diversity 1992; Nagoya Protocol to the Convention on Biological Diversity, art 12.

243 See, International Land Coalition 2009 Conference, Kathmandu Declaration: Securing Rights to Land for Peace and Food Security, April 23, 2009, available at <<http://www.landcoalition.org/en/resources/kathmandu-declaration>> Accessed on 13 Dec 2016.

244 Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water (The International Covenant on Economic, Social and Cultural Rights, arts 11–12), UN Doc. E/C.12/2002/11 (2002).

245 See Convention on the Elimination of All Forms of Discrimination Against Women, art 14 para 2(h); Convention on the Rights of the Child, art 24 para 2(c); the Geneva Convention relative to the Treatment of Prisoners of War, of 1949, art 20, 26, 29, 46; the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949, art 85, 89, 127; Additional Protocol I thereto of 1977, art 54–55; Additional Protocol II of 1977, art 5, 14; Principle No. 2, Programme of Action, Report of the United Nations International Conference on Population and Development, Cairo, 5–13 September 1994 (United Nations publication, Sales No. E.95.XIII.18), Chap 1, resolution 1, annex; paras 5 and 19, recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources; resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realization of the right to drinking water.

246 United Nations Declaration on the Rights of Indigenous Peoples, in Report to the General Assembly on the First Session of the Human Rights Council, un Doc. A/HRC/1/L.10 (2006), art 25.

247 *ibid.*

However, contrary to international law on the rights to natural resources and in particular, the right to water, there have been continuous violations against Kashmiris' economic self-determination, preventing or restricting people in Indian-Occupied Kashmir from using water and other natural resources for their own economic development including the use of electricity generated using water, as explained below. These activities also seem to violate Indian water laws, too.

Indian water laws are largely state-based. In colonial times and under the Government of India Act 1935, the power to legislate in this area was given to states. Thus, all of India's states have the exclusive power to regulate water supplies, irrigation and canals, drainage and embankments, water storage, hydropower, and fisheries.²⁴⁸ There are, however, restrictions with regard to the use of inter-state rivers.²⁴⁹ Unfortunately, this is not practiced with regard to Kashmir. Water and other resources such as minerals are either stolen or untapped because the necessary budgetary allocations and infrastructure aren't in place for their use by Kashmiris.²⁵⁰ For instance, even though adequate electricity supply is necessary for Kashmir's economic development and peace, investments in modernization, including the required infrastructure, are not made available to the Kashmir state government by the Government of India.²⁵¹ Organisations like the Kashmir Centre for Social and Development Studies have also raised concerns about the Indian government's departments and forces being exempted from paying electricity duties, and about their costs being passed to Kashmiri civilians.²⁵² Over 250,000 acres of state land have also been acquired by Indian government forces, depriving the state of revenues

248 Schedule 7, List 2, Entries 17 and 21, Constitution of India.

249 Schedule 7, List 1, Entry 56, Constitution of India; Also, see Philippe Cullet, *Water Law In India Overview Of Existing Framework And Proposed Reforms*, IELRC Working Paper 2007-01. Available at <<http://www.ielrc.org/content/w0701.pdf>> accessed 12 December 2016.

250 Rabia Noor, 'Rich mineral resources untapped in JK' Greater Kashmir (Srinagar, 5 June 2009) <<http://m.greaterkashmir.com/news/business/rich-mineral-resources-untapped-in-jk/52890.html>> accessed 1 December 2016.

251 See generally, Anatole Boute, *Russian Electricity and Energy Investment Law* (Brill) 2015. This book discusses the liberalization and privatization program that Russia is implementing to attract private investments in the energy sector.

252 Observer News Server, 'Kashmir civil society opposes proposed power tariff hike' *Kashmir Observer* (Srinagar, 30 March 2016) <<https://kashmirobserver.net/2016/local-news/kashmir-civil-society-opposes-proposed-power-tariff-hike-4919>> accessed 2 December 2016.

amounting to tens of thousands of crore.²⁵³ Likewise, people in Pakistani-Occupied Kashmir are economically deprived, which became evident during the aftermath of the earthquake in 2005.²⁵⁴ Since 1947, roads and infrastructure in the POK have not been properly developed.

Kashmir's economic wealth, like water²⁵⁵ and electricity,²⁵⁶ has also been plundered by India and Pakistan. The principal natural resource in Indian-Occupied Kashmir is the water from the Indus River.²⁵⁷ The Indus is a trans-Himalayan river that originates in south-western Tibet (China). It crosses the territory of the former Princely State of Kashmir, which has been occupied by India and Pakistan since 1947, and then flows through mainland Pakistan into the Arabian Sea. There are five main tributaries of the Indus: the Jhelum, Chenab, Ravi, Beas, and Sutlej. The Jhelum originates from a deep spring at *Vernag* in Indian-Occupied Kashmir, crosses the *Pir Panjal* Mountains and enters Pakistani-Occupied Kashmir, where it receives the *Kishenganga* River and then bends southwards entering the Punjab province of Pakistan.²⁵⁸ The Indus River Basin is divided between Pakistan (60% of the catchment area), India (with 20%), Afghanistan (5%), and Tibet (15%).²⁵⁹

253 Neva Nevlakha, 'Kashmir: The Clash of Identities' (*Beyond Intractability*, March 2009) <<http://www.beyondintractability.org/casestudy/navlakha-kashmir>> accessed 2 December 2016.

254 Lone, (n 3) 18.

255 Siachen Glacier Dispute, The Indus Water Treaty, 1960, construction of Dam on *Wullar* Lake in Kashmir; Ahmer Bilal Soofi, 'Legal Purview: Wullar Barrage, Siachen and Sir Creek' (2005) 7 *South Asian Journal* 91.

256 India gets 690 MW power from Salal (Kashmir) Power Station at 65 Paisa per unit and supplies the same electricity to people of Kashmir at 13 Rupees per unit (1 Rupee=100 Paisa; 1 Rupee=1 Pence). See Staff, 'Kashmir Water Resources go to Delhi's Belly: State Left to Beg' *Greater Kashmir* (Srinagar, 3 May 2008).

257 *Is Indus Water Treaty of 1960 Outdated: A Multidisciplinary Study of Power, Principles and Politics* General Research Fund (GRF) 2015, Dr Fozia Nazir Lone (PI, City University of Hong Kong), Co-I – Professor Daanish Mustafa (King's College London, the UK) and Professor Chen Huiping (Xiamen University, China) (1 Nov 2015–31 October 2018).

258 Encyclopædia Britannica Staff, 'Jhelum River' (*Encyclopædia Britannica*, 15 December 2015) <<http://global.britannica.com/EBchecked/topic/303711/Jhelum-River>> accessed 15 October 2016.

259 Ayesha Siddiqi, 'Kashmir and the Politics of Water' (*Aljazeera*, 01 Aug 2011) <<http://www.aljazeera.com/indepth/spotlight/kashmirtheforgottenconflict/2011/07/20117812154478992.html>> accessed 15 October 2016.

India has developed two hydro-power projects, Kishenganga and Baghlihar, in Indian-Occupied Kashmir, one on the Jhelum and the other in the southern Doda district.²⁶⁰ However, the electricity generated is used by the Government of India, and the Nominated Kashmiri government has limited rights to utilise electric power for the development of Kashmir. These hydro-water projects are controlled by the central authorities through Indian organisations. For example, Kashmir is capable of producing 20,000 megawatts (MW) of power from the dams but only produces 2256 MW, and the state only receives 12% of the generated power as a royalty from India's National Hydroelectric Power Corporation (NHPC), which delivers the rest to other parts of India.²⁶¹ Kashmir suffers many power shortages, and if electricity needed at peak hours is purchased back, the NHPC and others sell it at extortionate prices. India obtains 690 MW power from Salal (Kashmir) Power Station at 65 Paisa per unit and supplies the same electricity to people of Kashmir at 13 Rupees per unit.²⁶² While the PDP-BJP government has pledged to return control of some of these hydroelectricity resources to Kashmir, actions have been slow to come.²⁶³

The exploitation of resources in Kashmir is also problematic with regards to sustainability. The lack of attention paid to receding glaciers, criticisms about the Indian Rivers interlink project, and warnings about the lack of earthquake safety in relation to the dams show the attitude taken towards these resources and the safety of the people of Kashmir.²⁶⁴ The consequences of this violation

260 In 2010 Pakistan took two disputes to the Permanent Court of Arbitration on the Indian projects of Kishenganga and Baghlihar. Pakistan complained that these dams violated the IWT by increasing the catchment area of the Jhelum River and depriving Pakistan of its water rights. The Permanent Indus Commission and its mechanisms have failed to resolve this dispute. In fact, this dispute could be reopened again after a period of seven years from the first diversion of water from the Kishenganga/Neelum River. See *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Final Award December 20, 2013; Staff, 'Indus water talks: Pakistan to seek ICJ intervention if talks fail' *The Tribune* (Karachi, 26 August 2014) <<http://tribune.com.pk/story/753681/indus-water-talks-pakistan-to-seek-icj-intervention-if-talks-fail/>> accessed 15 October 2016; PCA Press Release, *Indus Waters Kishenganga Arbitration (Pakistan V. India)*, Court of Arbitration Renders its Final Award in the First Arbitration under the Indus Waters Treaty 1960, The Hague, 21 December 2013.

261 Baba Umar, 'Kashmir: A Water War in the Making?' <<http://thediplomat.com/2016/06/kashmir-a-water-war-in-the-making/>> accessed 5 November 2016.

262 (1 Rupee=100 Paisa; 1 Rupee=1 Pence). See, Staff (n 256).

263 Aaliya Ahmed, 'NHPC and exploitation of Kashmir's water resource' *Rising Kashmir* (Srinagar, 21 April 2016) <<http://risingkashmir.com/article/nhpc-and-exploitation-of-kashmirs-water-resource>> accessed 2 December 2016.

264 Umar, (n 261).

of Kashmiris' rights to economic self-determination became apparent in the September 2014 flooding in the Kashmir region, which was caused by rising water levels in the Indus River and its tributaries – the Jhelum and Chenab. These deadly and destructive floods have killed hundreds, displaced over a million people,²⁶⁵ and caused damage to property worth billions of Rupees.²⁶⁶ It is clear that the Indus Water Treaty (IWT) 1960, which was signed between India and Pakistan, had partly contributed to the flooding. It was obvious that the limitations on the exchange of data and water usage under this treaty framework made it hard for the Nominated pro-Indian authorities to forecast floods and efficiently use water in different seasons. In fact, the local Nominated authorities had no contingency plan in place. In 2015, following further floods, deaths, and property damage, the Nominated government wrote to the Ministry of Water Resources to request Rs 401 crore for a project report and urgent works to stop further reoccurrence. The approval process for such a project is complicated, and requires submissions to the Indian government at several levels before budgetary allocations may be made. This bureaucratic back and forth between the Nominated Government and the central government shows the lack of attention and care given to the protection of people and conservation of Kashmir's natural resources.²⁶⁷

The IWT was signed with the assistance of the World Bank in 1960 to remedy colonial disputes about the Indus waters. Disputes have been ongoing ever since the British Indian government proposed major irrigation schemes in the Sutlej Valley, the Sukkur Barrage, and the Bhakra projects.²⁶⁸ This gave rise to intra-province disputes between Punjab and Sind (downstream riparian). With the partition of British India, Punjab was divided between India

265 Jason Burke and Jon Boone, 'Kashmir monsoon floods leave 460 dead and displace almost a million' *The Guardian* (London, 11 September 2014) <<https://www.theguardian.com/world/2014/sep/11/kashmir-monsoon-floods-million-displace-pakistan-india-aid>> accessed 2 December 2016.

266 Sheikh Qayoom, 'Too much of development in Jhelum's flood basin led to the river's fury' *The Weekend Leader* (Chennai, 29 September 2014) <<http://www.theweekendleader.com/Nature/2008/nature-s-warning.html>> accessed 2 December 2016.

267 Staff, 'Jammu and Kashmir floods killed 44 people, injured 25 others, says state govt' *First-post* (9 April 2015).

268 Mss Eur F172/12, 1839–40: Private Papers. Papers of Lt-Col Thomas Walter Powell, British Army 1807–39 and other members of his ... Papers of Lt-Col Thomas Sidney Powell, British Army 1826–57. Map (published 1834) of the Indus River and of the neighbouring

and Pakistan. The new border complicated the water dispute as the irrigation head-works remained in India and the areas it irrigated were allocated to Pakistan. The new boundary also cut across the Indus Basin in Kashmir.²⁶⁹ In the post-partition era, the Kashmir dispute became a battleground between India and Pakistan over their unresolved water conflict, as the significant river for their head-works remains in the Princely State of Kashmir.²⁷⁰ In 1948, the water dispute deteriorated after India cut off the water supply to Pakistan subsequent to the 1947 Indo-Pakistan war in Kashmir. In 1960, after several rounds of negotiations, the IWT was signed between India and Pakistan.

The IWT treats the Indus River as a water tap for India and Pakistan, allocating the western rivers (Indus, Jhelum and Chenab) to the exclusive use and benefit of Pakistan and the eastern rivers (Ravi, Beas and Sutlej) to India, who would also control their development. As such, Kashmiris do not have any property or equitable rights²⁷¹ over the use of their own water resources, which are allocated to the exclusive use of India and Pakistan. As stated, under

Countries comprising Sind, parts of Baluchistan and Afghanistan, Kashmir, Punjab, Rajputana etc. by the Surveyor General of India (marked with Thomas Sidney Powell's route from Kabul to the mouth of Indus 1839–40). Held by British Library: Asia, Pacific and Africa Collections (previously Oriental and India Office Library); JMS/11/39 RGS; Journal Manuscripts Collection Journal Mss India. Henderson, Capt. Report regarding the flood which occurred in the Indus on Aug 10 1858 Letter from R. Temple (Punjab Commissioner) to Capt. Henderson Dec 22 1858 Ms. copy of letter from C.H. Dickens to Sir J. Lawrence (Punjab Commissioner) Oct 18 1858 Ms. copy of report by Henderson. 6 double pp. 8½ by 6½ Referee report W.H. Sykes Not published. Held by Royal Geographical Society 01/01/1860 31/12/1860; IOR/V/23/336, vol 2 no 12 art 25 India Office Records. Official Publications. Selections from the Records; Selections from the Public Correspondence of the Administration for the Affairs of the Punjab.... Some account of the survey of the northern trans-Indus frontier, from Peshawar to Dera Ismael Khan, 1849–53, by Lieut. [J.T.] Walker. Lahore: Chronicle Press, 1854–55 Index No 1965 Held by British Library: Asia, Pacific and Africa Collections (previously Oriental and India Office Library) 01/01/1854 31/12/1855.

269 Dante A Caponera, *National and International Water Law and Administration* (Kluwer Law International 2003) 230; Aloys Arthur Michel, *The Indus Rivers: A Study of the Effects of Partition* (Yale University Press 1967); Daanish Mustafa, 'To each according to his power? Access to irrigation water and vulnerability to flood hazard in Pakistan' (2002) 20 *Environment and Planning D: Society and Space* 737.

270 Fozia Nazir Lone, 'Restoration of Historical Title and the Kashmir Question: An International Legal Appraisal' (PhD Dissertation, University of Aberdeen, 2008).

271 Caponera, (n 269); the international laws on trans-boundary waters, which are governed by The 1997 UN Convention on the Non-Navigational Uses of International Watercourses and the 2004 ILA Berlin Rules on Water Resources, call for the equitable and reasonable utilisation of shared watercourses (arts 5–6) and the obligation to do no harm (art 7);

the IWT framework, only limited data about the flow and utilisation of the waters is given, which prevents any prediction of possible floods.²⁷² The IWT contains only 12 articles and has no specific provisions on the exchange of data about the Jhelum and Indus rivers. Since 1960, no protocols have been added to reflect modern water resource management as required under the 1997 UN Convention on the Non-Navigational Uses of International Watercourses²⁷³ and the 2004 ILA Berlin Rules on Water Resources.

It seems that the IWT framework was an attempt to avoid the reality that the Indus water resources flow through the occupied territory of Kashmir. As such, the World Bank was technically engaged in a process of dividing the natural resources of Kashmir between the two aggressors, namely, India and Pakistan. Since the Indus water flows from Indian-Occupied Kashmir, the corollary of this water-sharing treaty between India and Pakistan seems to be the recognition of India's title over Indian-Occupied Kashmir following its illegal annexation. However, under the international law this is not acceptable. International law calls for the non-recognition of title to territories acquired by the use of force and, for that reason alone, the IWT seems to be null and void in its application to occupied territory of Kashmir that was raised in relation to Australia when it ratified the Timor Gap Treaty.²⁷⁴ Through this treaty Australia and Indonesia divided up East Timor's resources (specifically, the continental shelf area between northern Australia and East Timor that contained oil) that were acquired through Indonesian aggression.²⁷⁵ The nullification of the

See also ILC Draft Articles on the Law of Non-Navigational Uses of International Watercourses (Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49 Session, Supp. No.10 at 197, U.N. Doc. A/49/10 1994 (hereinafter 1994 ILC Report); Aaron T. Wolf, 'Criteria for equitable allocations: The heart of international water conflict' (1999) 23 Natural Resources Forum 3.

272 Indus Water Treaty 1960, art VI.

273 Based on ILC Draft Articles on the Law of Non-Navigational Uses of International Watercourses (Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR, 49 Session, Supp. No.10 at 197, U.N. Doc. A/49/10 1994) (hereinafter 1994 ILC Report).

274 'Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia', 11 December 1989.

275 After Portugal left the territory of East Timor subsequent to August 1975, FRETILIN (Revolutionary Front for an Independent East Timor/ *Frente Revolucionária de Timor-Leste Independente*) declared independence. However, Indonesia soon invaded and occupied East Timor in 1975. The United Nations, through the General Assembly and the Security Council, adopted resolutions which condemned the Indonesian invasion and reaffirmed

Timor-Gap Treaty was based on its conflicts with the principles of *nemo dat quod non habet* (no one gives what he doesn't have) and other peremptory norms of general international law.²⁷⁶ Clark argued that Australia cannot get good title through the Indonesian use of force, which had breached the *jus cogens* norms of prohibiting aggression.²⁷⁷ As such, Australia breached its international obligations by ratifying the Timor Gap Treaty, the subject matter of which was acquired by use of force.²⁷⁸ Clark further argued that the Timor Gap Treaty also undermined the right to self-determination of the East Timorese people.²⁷⁹

Since Indonesia had not accepted the jurisdiction of the International Court of Justice (ICJ), on 22 February 1991 Portugal instituted proceedings against Australia (*Case Concerning East Timor (Portugal v. Australia)*)²⁸⁰ in the ICJ, arguing that Portugal had duties as an administering power and that they had to act in the interests of the people of East Timor. In its Judgment on the *Case Concerning East Timor*, the ICJ, by 14 votes to 2, decided that it was unable to not exercise the jurisdiction conferred upon it by the declarations made by the Parties under Article 36 (2) of its Statute to adjudicate upon the dispute referred to it by the Application of the Portuguese Republic.²⁸¹ However, the ICJ maintained that the Territory of East Timor remains a non-self-governing territory and that its people have the right to self-determination.²⁸²

the right of the Timorese to self-determination, and called for withdrawal of the Indonesian forces. G.A. Res. 3485 (XXX), U.N. GAOR, 30th Sess., Supp. No. 34, at 118, U.N. Doc. A/10034 (1976); S.C. Res. 384, U.N. SCOR, 30th Year, Resolutions and Decisions 10, U.N. Doc. S/INF/31 (1976). G.A. Res. 31/53, U.N. GAOR, 31st Sess., Supp. No. 39, at 125, U.N. Doc. A/31/39 (1977). See also generally Roger S. Clark, 'The Timor Gap: The Legality of the "Treaty on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia" (1992) 4 Pace International Law Review 69.

276 The Vienna Convention on the Law of Treaties, 1969, U.N. Doc. A/CONF.39/27 (1969), art 53.

277 See Clark, (n 275) 93–95.

278 See Michael Shane French-Merrill, 'The Role of the United Nations and Recognition in Sovereignty Determinations: How Australia Breached Its International Obligations in Ratifying the Timor Gap Treaty' 8 Cardozo Journal of International and Comparative Law 285, 317.

279 Roger S. Clark, 'The "Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression' (1980) 7 Yale Journal of World Public Order 2.

280 Judgment of 30 June 1995.

281 *East Timor (Portugal v. Australia)*, Summary of the Judgment of 30 June 1995 <<http://www.icj-cij.org/docket/index.php?sum=430&p1=3&p2=3&case=84&p3=5>> accessed 13 December 2016.

282 *ibid* paras 36–37.

In view of the laws on economic self-determination and the East Timor case, it becomes clear that the IWT was the fruit of the geographical imaginings of the dominant states which negotiated it during the Cold War as facilitated by the World Bank dominant member countries from the global North.²⁸³ Their acts have led to breaches of the right of Kashmiris to economic self-determination. Over the years, and especially after the devastating 2014 floods in Kashmir, the ongoing and brazen violations of the economic rights of Kashmiris have become more apparent. Under these circumstances, the IWT emerges as a macro-scale treaty, which at the practical level is imposed onto a micro-scale reality and creates various hazards in human environments, including floods. These dangers have increased given China's building of the Senge-Ali dam in 2008²⁸⁴ without informing India and Pakistan. The dam is strategically located only a few miles eastward of Tibet, which borders Aksai Chin, the aforementioned disputed territory of the Princely State of Kashmir that was occupied by China in the 1962 war with India.²⁸⁵

As the above discussion shows, since 1947 Kashmir has become a combat zone where India and Pakistan struggle over their unfinished colonial water dispute. In this ongoing Indo-Pakistan battle, Kashmiris are prevented from exercising their economic self-determination by using their own natural resources for their own development.

The Policy to Destroy the Culture of Kashmiriyat

Since 1947, India has maintained a consistent policy of destroying the Kashmiri culture of *Kashmiriyat* with the aid of Kashmir's Pro-Indian Government. Under this policy, the Kashmiri language and its people's history have been suppressed. Kashmiri cultural, linguistic, and economic history is connected to Central Asia and Persia, but those centuries-old ties have been largely cut since 1947.²⁸⁶ Even the language was not taught in schools for almost 50 years; it was excised from the syllabus in 1953 after Prime Minister Sheikh Abdullah, who helped to develop Kashmiri textbooks for use from 1948, was removed from power. Kashmiri was only introduced back into the school syllabus in

283 Undala Z Alam, 'Questioning the water wars rationale: a case study of the Indus Waters Treaty' (2003) 168(4) *Geographical Journal* 341.

284 Alice Albinia, *Empires of the Indus The Story of a River* (W.W. Norton & Company 2010).

285 DP Choudhury, 'The North-East Frontier of India' (1970) 4 *Modern Asian Studies* 359, 360.

286 Bukhari, (n 122).

2002.²⁸⁷ There is now a policy of teaching Kashmiri as a compulsory subject for students up to the 8th grade, though it is not the medium of instruction and there has been criticism that no subject-specific posts have been created for teachers of Kashmiri.²⁸⁸ The state-sponsored institutions influencing work in Kashmiri have also had a demoralising effect, and there is a widespread feeling that there is limited space for people who write against the government line.²⁸⁹ Kashmiri children are not even taught Kashmiri history in schools; the focus is on learning Indian history. In 2009, the Jammu and Kashmir Education Board committed to begin teaching the history of the region at the secondary level.²⁹⁰

There are reported instances in which more than 450 Kashmiri orphan children²⁹¹ were deported to various parts of India. For instance, in December 2004, about 250 Kashmiri orphan children were given for adoption to the *Markaza Ssaquafathi Ssunniyya* (Sunni Cultural Centre) in Kozhikode (India) by the Chief Minister of Kashmir under the auspices of the Nominated Government.²⁹² Likewise, in 2006, the J&K High Court discovered that

287 Omkar N Koul, 'On the Teaching of Kashmiri and Dogri in Jammu & Kashmir' (Kuvem pubhashabharathi.org, undated) <http://www.kuvempubhashabharathi.org/kannada/sites/default/files/prabandha/On_the_Teaching_of_Kashmiri_and_Dogri_in_Jammu_&_Kashmir_ON_Koul.pdf> accessed 25 November 2016.

288 Omkar N Koul, 'A Survey of Language Preferences in Education in India' (2006) 6(3) Language in India 17; Staff, 'No post created to teach Kashmiri in schools: Govt' *Kashmir Post* (Srinagar, 9 October 2015) <<http://kashmirpost.org/2015/10/09/no-post-created-to-teach-kashmiri-in-schools-govt/>> accessed 25 November 2016; Asiya Raheem, 'Kashmiri – A beautiful language dying a slow death' *Kashmir Observer* (Srinagar, 31 March 2016) <<https://kashmirobserver.net/2016/melange/kashmiri-beautiful-language-dying-slow-death-4973>> accessed 27 November 2016.

289 Hilal Mir, 'Future of Valley at stake? Why Kashmiri language gets little attention' *Hindustan Times* (New Delhi, 10 April 2016) <<http://www.hindustantimes.com/india/future-of-valley-at-stake-why-kashmiri-language-gets-little-attention/story-GdZskfwsyogKNun3MRzZgH.html>> accessed 5 December 2016.

290 Showket Jan, 'Kashmir schools to include State history in syllabus' *Hindustan Times* (New Delhi, 8 April 2009) <<http://www.hindustantimes.com/education/kashmir-schools-to-include-state-history-in-syllabus/story-uwOICFb8N7l9l6ZOweu5JL.html>> accessed 5 December 2016.

291 The *Yateem* Foundation survey shows that the number of orphans in the valley alone is 15,288, though the total number is more than 50,000. See Public Commission on Human Rights, (n 155) 32.

292 This was reported with approval in the Indian press. See Staff Reporter, 'Children from Kashmir arrive to a warm welcome' *The Hindu* (Chennai, 13 December 2004) <<http://www.thehindu.com/2004/12/13/stories/2004121305110400.htm>> accessed 15 October 2016.

200 Kashmiri Muslim children had been transported to Pune and given to the *Bharitya Jain Sangathan* (BJS), a Hindu orphanage, in December 2005 after they were fallaciously portrayed as orphans of an earthquake. The High Court, in a Division Bench ruling on 3 June 2006, stated that it was beyond any reasonable doubt that these children were not orphaned by earthquake damage.²⁹³ It was therefore a clear violation of rights of the children, who were taken against their will to Pune (India).

Regarding the increase in the number of orphan children in Kashmir due to the ongoing claims for the right to self-determination, the Nominated Government, instead of creating social welfare institutions for Kashmiri orphan children, is exiling them from their native land. It is argued that this government policy is depriving the Kashmiri children of their identity, language, and culture. It is also destroying the fabric of the Kashmiri culture of *Kashmiriyat*.

Since 1947, it has been Indian policy to change the demographic composition of the State of J&K by settling non-Kashmiris there.²⁹⁴ The policy has been pursued with the intent of making the results of a plebiscite, should it ever be held, favourable to India. A 1957 letter from the UN Permanent Representative of Pakistan to the President of the Security Council suggested that India had settled a large number of non-Kashmiri people in the areas of Nawashehr, Riasi, Nowhehra, and Rajouri, as well as the districts of Jammu, Kathua and Udhampur. The properties that were left behind in the state by Muslims, who were killed or driven out during the 1947 war, were declared as evacuee properties and were allotted to settlers of non-Kashmiri origin.²⁹⁵

It is also the policy of the Bharatiya Janata Party (BJP), the Hindu nationalist party that ruled India from 1996–2004 and has again been in power since 2014, to manipulate the demographics in Kashmir by calling for the revocation of Article 370 and encouraging Hindu and Sikh settlements.²⁹⁶ Over the years,

293 NA Ganai, '200 Children Shifter to Pune were not Quake Hit' *Greater Kashmir* (Srinagar, 6 June 2006).

294 Sumit Ganguly and Kanti Bajpai, 'India and the Crisis in Kashmir' (1994) 34 *Asian Survey* 401, 406; Staff, 'Hurriyat factions decry all-party meeting on refugees, delimitation' *The Tribune* (Karachi, 13 May 2007).

295 FO 371/129777: DY1041/312: Saving telegram from UKDEL New York to Foreign Office, 7 August 1957 Letter from Permanent representative of Pakistan (of UN) to the President of Security Council.

296 Raju GC Thomas, 'Reflections on the Kashmir Problem' in Raju GC Thomas (ed), *Perspectives on Kashmir* (Westview Press 1992) 33.

India has permitted a large-scale influx of non-Kashmiris to settle in Kashmir giving rise to some unwelcome social issues.²⁹⁷ This policy has also cost the local labour class many jobs. Non-residents²⁹⁸ are officially allowed to purchase land in the State of J&K. In fact, the Pro-Indian Government organised an auction of land in Gulmarg (a tourist resort in Kashmir) where the bidders were mostly non-Kashmiris.²⁹⁹ Indian people have purchased and constructed houses in Kashmir and have also obtained Permanent Resident Certificates, which is a clear violation of Article 370.³⁰⁰ The exact number of non-residents currently present in Kashmir is unknown, as there are no official figures available. However, the figure appears to be in the hundreds of thousands, as non-Kashmiris can be seen virtually everywhere in Kashmir and are engaged in many occupations as cobblers, street vendors, beggars, members of the armed forces etc.³⁰¹ The reallocation of forest land to the SASB by Governor Vohra, as discussed earlier in this chapter, is blatant evidence of there having been a change in the demographic composition of Kashmir.³⁰² This caused large protests in 2008 and many Kashmiris were killed.³⁰³

The BJP government, under their segregation policy, is now making arrangements for resettling Kashmiri Pandits in Sainik colonies in Kashmir, although there has been resistance from the Chief Minister on the issue.³⁰⁴ At an

297 Some of the non-Muslim settlers from other parts of India give rise to the social issues like prostitution, drug trafficking and begging which were unknown in Kashmir. They also act as army informers.

298 These people are mostly traders from various parts of India like Himachal Pradesh, Uttranchal, Bihar and Gujarat. See, Z Malik, 'Brazen Violation of Article 370: 120 Outsiders Settle in Rajouri' *Greater Kashmir* (Srinagar, 26 April 2005) 1.

299 M Hyderi, 'Gulmarg on Sale, Again!' *Kashmir Media* (5 November 2006) <<http://kashmirmedia.wordpress.com/2006/11/05/gulmarg-on-sale-again-2/>> accessed 14 July 2008.

300 Malik, (n 298) 1.

301 Staff, 'Bihaari Invasion in Kashmir, why?' *Timez of Kashmir* (Blog, 27 July 2007) <<http://eldinbleze.blogspot.com/2007/07/bihaari-invasion-in-kashmir-why.html>> accessed 14 July 2008.

302 Wax, (n 120).

303 Reuters, 'Mourners riot over Kashmir protest deaths' *Financial Times* (London, 13 August 2008) <http://www.ft.com/cms/s/0/1fa9b5d6-6921-11dd-91bd-0000779fd18c.html?ft_site=falcon&desktop=true> accessed 2 December 2016.

304 PTI, 'BJP bats for establishment of Sainik Colony in Kashmir' *Indian Express* (Mumbai, 28 May 2015) <<http://indianexpress.com/article/india/india-news-india/mehbooba-mufti-jammu-kashmir-sainik-colony-bjp-national-secretary-shrikant-sharma-kashmiri-pan-dits-2823664/>> accessed 2 December 2016.

event held between the two Hurriyat factions and the JKLF, it was stated that while Pandits are welcome, the setting up of colonies would not be tolerated.³⁰⁵

A Legal Assessment of the Unlawful Constitutional Incorporation of Kashmir into the Indian Union

As discussed in Chapter 4, Kashmir was a sovereign State before India seized it under the cover of the invalid IOA. The discussions in Chapter 3 demonstrate that internationally there is a strong presumption that the statehood of states that are occupied through the illegal use of force is protected, and that they retain the right to state continuity even if they are de facto extinguished temporarily by the *occupatio bellica*.³⁰⁶ Therefore, belligerent occupation and annexation does not lead to the extinction of the international personality of a state, as is demonstrated by the treatment of several states that were occupied by Nazi Germany during WWII.³⁰⁷ It is generally accepted that no title to territory can be acquired through the illegal use or threat of armed force, not even when the seizure is effective and organised resistance against the invaders has ceased.³⁰⁸ The statehood of the Baltic States, despite being militarily occupied, was considered to be uninterrupted prior to the Soviet occupation in 1940. When reinstating diplomatic relations with the Baltic States, Germany declared that the 'Baltic States are not recognised but that the interrupted diplomatic relations has merely been re-established'.³⁰⁹ After the 2014 Ukrainian

305 Bashaarat Masood, 'Separatists' meet: "Kashmiri Pandits welcome but not separate colonies"' *Indian Express* (Mumbai, 13 June 2016) <<http://indianexpress.com/article/india/india-news-india/sainik-colony-jammu-kashmir-pandits-ali-shah-geelani-2849553/>> accessed 2 December 2016.

306 Krystyna Marek, *Identity and Continuity of States in Public International Law* (Libr. Droz 1954) 15; Näher W Fiedler, 'Continuity' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (North-Holland 1992) vol 1, 808.

307 David Raič, *Statehood and the Law of Self-Determination* (Kluwer Law International 2002) 67; Josef L Kunz, 'Identity of States under International Law' (1955) 49 *AJIL* 68.

308 UN GA Res 3314 (XXIX), 14 December 1974, art 5(3). See Clark, (n 275) 93–95; Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP 2004) 333.

309 Rein Müllerson, 'The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia' (1993) 42 *ICLQ* 473, 480–83.

revolution the Crimea, apart from being in a situation of secession from mainland Ukraine (which took place with Russia's support) was also construed as being under military annexation by Russia.³¹⁰ The majority of states, including Ukraine, do not recognise Crimea as part of Russia. The Council of Europe has expressed concern over the human rights violations against the Tatars and Ukrainians in the Crimean peninsula since the annexation by Russia.³¹¹

This discussion on Kashmir suggests that, at present, Indian-Occupied Kashmir is an armed encampment with up to 700,000 Indian soldiers present at any one time. From the analysis of the facts in the previous sections, it is clear that the Indian incorporation of Kashmir was completed with the help of the army and with the assistance of the installed Pro-Indian Government. Keeping these facts in view, the questions that beg responses are: (1) was Kashmir's constitutional incorporation valid and can it remedy the illegal seizure of Kashmir that was carried out with unlawful armed force?; (2) can Kashmir's integration, which was completed by undemocratic means, achieve a legitimate status internationally?; (3) is unlawful incorporation evidence of the illegal seizure?; and, finally, (4) can the presence of human rights violations and unrepresentative government in Kashmir entitle them to claim 'constitutional secession' under the 1970 Declaration?

Is the Indian Incorporation of Kashmir Valid/Legal and can it Remedy/Cure Illegal Occupation?

In situations where there have been longstanding unlawful occupations, as in the Baltic Republics or Kashmir, the restoration of original conditions under the principle of *restitutio ad integrum* cannot be strictly applied.³¹² It is

³¹⁰ Khazar Shirmammadov, 'How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination: The Case of Crimea' (2016) 4(1) Russian Law Journal 61, 75; Buchanan, (n 308) 94. See also generally Major Justin A Evison, 'MiGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of *Uti Possidetis* and Internationally Recognized Self-Determination' (2014) 220 Military Law Review 90, 105–06; Amandine Catala, 'Secession and Annexation: The Case of Crimea' (2015) 16 German Law Journal 581, 585, 601–02.

³¹¹ Gabriele Steinhauser, 'Human Rights Worsen in Crimea, Report Says' *The Wall Street Journal* (New York, 27 October 2014) <<http://www.wsj.com/articles/human-rights-worsen-in-crimea-report-says-1414416579>> accessed 19 December 2016.

³¹² Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between and Normatively and Power in International Law* (Martinus Nijhoff 2003) 289.

literally impossible to ignore the changes that have been affected through illegal occupation and constitutional incorporation. Consequently, the clock of history cannot be wound back to re-establish former rights without taking note of the modifications in the domestic sphere carried out by the occupying power through the incorporation process. Therefore, 'pure' *restitutio ad integrum* and state restoration becomes impossible after many years, due to the changes in the social, political, and economic sectors brought about by integration. For these reasons, the Baltic States had to temporarily retain laws adopted by their local legislative bodies during Soviet occupation, even though those former Soviet laws had been forcefully imposed on them.³¹³

At the moment, Kashmir is going through Russian style incorporation under India. Indian laws have been forcefully imposed on Kashmir during the last 70 years of illegal occupation. Whether the Indian incorporation of Kashmir is legal has to be verified with reference to various parameters, such as (1) the validity of the IOA and, if it is valid, whether India has acted in compliance with it; (2) the legitimacy of the Pro-Indian Government; (3) the recognition/non-recognition of the incorporation process by the international community; and (4) the nature of incorporation.

As discussed in Chapter 4, when Fitzmaurice provided his revised legal opinion (in a Foreign Office document dated 26 May 1949) he noted that under international law and practice, any member state of the UN has the right not to recognise Kashmir as a part of India. In particular, if they have doubts as to the legal validity of the accession or feel that it was concluded in dubious circumstances, they may feel that it is politically necessary to deny recognition.³¹⁴ Keeping Fitzmaurice's legal opinion in view, it is unnecessary to go into the details of the provisions of the IOA, as the international community is justified in refusing to recognize the purported accession. However, assuming that the IOA was valid (as India argues) then its relations with Kashmir would be governed by the terms of this instrument. It is therefore necessary for India to abide by all the provisions of IOA, including the sections that limit her territorial claim over Kashmir.

Sections 6, 7 and 8 of the IOA clearly declare that this agreement did not give *carte blanche* authority to India to make laws related to the territory of Kashmir, nor did it commit the Maharaja to accepting the Indian constitution.³¹⁵

313 *ibid* 287; Peter Van Elsuwege, 'State Continuity and its Consequences: The Case of the Baltic States', (2003) 16 (2) *Leiden Journal of International Law* 377, 381 & 887.

314 F 10914/10125/85, (n 1) para 15 (Unpublished Source).

315 The Instrument of Accession of Jammu and Kashmir State, 26 October 1947, Sections 6–8.

It appears that the signing of the IOA did not affect the exercise of the Maharaja's sovereignty in and over Kashmir. The schedule to the IOA clearly states that the areas in which India could make laws for Kashmir are limited to defence, foreign affairs, and communications.³¹⁶ As discussed in Chapter 4, the letter from Mountbatten to the Maharaja of Kashmir³¹⁷ made it clear that the future of the territory of Kashmir would be decided through a reference to its people. In unambiguous terms, the UN Security Council Resolutions (SCRs) make it clear that the future of the State of Kashmir would be decided in accordance with the 'will of the people expressed through the democratic method of free and impartial plebiscite conducted under the auspices of the UN'.³¹⁸

It is therefore obvious that any Indian constitutional incorporation of Kashmir has to abide by the provisions of the IOA as well as the SCRs, particularly SCR 91 and 122, which call for a plebiscite and affirm that the future shape and affiliation of the whole or any part of Kashmir cannot be decided by the actions of any political parties or the Nominated Government.³¹⁹ Clearly, if the incorporation process does not abide by these provisions, then it is invalid. Hence, laws such as Article 370 of the Indian Constitution, the Delhi Agreement 1952, the Constitution of J&K 1957, and the Kashmir Accord 1975, which were passed to incorporate Kashmir into India, violated the provisions of the IOA and hence are invalid. It is argued that these laws therefore cannot define the territorial claims of India and, to that extent, the incorporation process carried out by India has been and continues to be unlawful. The inter-temporal principle also suggests that only the law in force at the time of a putative establishment can be used to gain title to territory.³²⁰ Testing the title of India over Kashmir in light of the IOA, it is suggested that since India did not abide by those provisions, the laws used to incorporate in ways contrary to the provisions of the IOA are illegal.

316 The Instrument of Accession of Jammu and Kashmir State, 26 October 1947, Schedule A, B, C.

317 FO 371/129775: Letter dated 27 October 1947 from the Governor-General of India, New Delhi to Maharaja of Jammu and Kashmir.

318 FCO 37/914, (n 142).

319 SCR 91, 30 March 1951; SCR 122, 24 January 1957.

320 Thomas D Grant, 'A Panel of Experts for Chechnya: Purposes and Prospects in Light of International Law' (1999) 40 *Virginia Journal of International Law* 115, 167–68.

The Nominated Government in Kashmir was brought into existence exclusively to complete the constitutional incorporation of Kashmir into India. As discussed in this chapter, the Maharaja was coerced into installing a Pro-Indian Government that could allow India to transport laws into Kashmir that were outside the provisions of the IOA. The purpose of installing the Pro-Indian Government was only to assist India in legitimising its doubtful title acquired through the invalid IOA over Kashmir.

There is a highly favoured opinion within international law that a government created through coercion is invalid. In cases where there have been illegal occupations, it is common practice that the lawful government is either exiled, like in Estonia,³²¹ or replaced, as in the other Baltic States.³²² In these circumstances, the dummy Nominated Government is neither legitimate, nor does it cause the extinction of the occupied state. It is argued that the historical State of Kashmir continues to exist despite the forced changes to its government. Despite the lack of an effective government,³²³ Kashmir still exists as a state just as it did in 1947.

In Kashmir, the Pro-Indian Government is kept in power through undemocratic actions such as vote-rigging and barring some political parties from participation in the electoral process. This government is, therefore, not a true representative of the people. In the contemporary era, a state's commitment to democracy is an important factor for its recognition. For example, the 1993 Copenhagen Criteria makes it clear that to join the EU, a new Member State must meet the political criterion of having stable institutions that guarantee 'democracy, the rule of law, human rights and the respect for and protection of minorities'.³²⁴ The regime in Kashmir does not meet any of these standards. The Pro-Indian Government was nominated by India for the sole purpose

321 Stefan Talmon, 'Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law' in Guy S. Goodwin-Gilland & Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (Oxford Clarendon Press 1999) 499.

322 Kazimierz Maolej Smogorzewski, 'Lithuania' in *Encyclopædia Britannica* (Encyclopædia Britannica, Inc 1961) 217.

323 James R Crawford, *The Creation of States in International Law* (Oxford Clarendon Press 1979) 28.

324 Accession Criteria – the Copenhagen European Council 1993 (Strengthened by the Madrid European Council in 1995 & updated by the Lisbon Treaty December 2007) <http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html> accessed 15 October 2016.

of providing the necessary illusion of consent to legitimise its acquisition of the title to the territory of Kashmir. For these reasons, it is argued that the Nominated Government in Kashmir remains below the standards expected from a legitimate government under international law and can be classed as an undemocratic regime. Therefore, the incorporation process completed by this government through the signing of various laws, instruments, and accords with India with intent to integrate Kashmir into the Indian Union are also invalid.

The nominated Jammu and Kashmir Constituent Assembly (JKCA), which was established in 1951, was not recognised by the international community. Security Council Resolution (SCR) 91 of 1951 was passed after the 'General Council' of the 'All Jammu and Kashmir National Conference' adopted a resolution on 27 October 1950 recommending the convening of a JKCA to determine the 'future shape and affiliations of the Jammu and Kashmir'.³²⁵ The SC, taking note of this situation, affirmed that:

The convening of a constituent assembly as recommended by the General Council of the 'All Jammu and Kashmir National Conference' and any action that assembly might attempt to take to determine the future shape and affiliation of the entire State or any part thereof would not constitute a disposition of the State.³²⁶

Hence, SCR 91(1951) made it clear that the actions taken by the JKCA with the intention of determining the final disposition of the State of J&K would not decide the Kashmir issue. After the formation of the JKCA, the SC received explicit assurances from the GOI at various stages of the process that the convening of this assembly would not decide the future status of Kashmir. In particular, on 9 March 1951, Sir Benegal Rau stated:

Will that Assembly [JKCA] decide the question of accession? My Government's view is that, while the Constituent Assembly may, if it so desires, express an opinion on this question, it can take no decision on it.³²⁷ (Emphasis added)

325 SCR 91, March 1951 and SCR 122, January 1957.

326 SCR 91, March 1951, Preamble, and SCR 122, January 1957.

327 FO371/129777: DY1041/40(A): Outward Telegram from Commonwealth Relations Office: To UK High Commissioner in Australia, India and Pakistan, 25 January 1957 [NAL].

This statement clearly suggests that the GOI had outwardly agreed that the JKCA would not be able to take any binding decisions on the question of accession. However, the incorporation process was undoubtedly a method to try to legitimise the illegal and incomplete accession without fulfilling the condition of conducting a plebiscite. Therefore, the incorporation process, from the point of view of the international community and the statements Indian representatives have made to the world, is also illegal and India cannot refuse to abide by its 'unilateral declarations'.³²⁸

In 1957, the JKCA passed a new Constitution of Kashmir, replacing its original constitution of 1939. Under the new Constitution, Kashmir was described as 'an integral part of the Union of India',³²⁹ including the part under Pakistani control.³³⁰ The international community was concerned about this action by the JKCA. They were also of the opinion that this change might create a legal loophole that would enable the Indians to avoid implementing UN decisions on Kashmir.³³¹ There was apprehension that this would affect the actualisation of the promised plebiscite.³³² In order to condemn the actions of the JKCA, the SC passed SCR 122 (1957),³³³ reaffirming the international community's position adopted in SCR 91 (1951) and declaring that:

Any action that assembly [JKCA] may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the assembly, would not constitute a disposition of the State.³³⁴

³²⁸ See a discussion on the 'unilateral declarations' in Chapter 6, Section 6.5.

³²⁹ FO371/129777: DY1041/40(A): Outward Telegram from Commonwealth Relations Office: To UK High Commissioner in Australia, India and Pakistan, 25 January 1957 [NAL].

³³⁰ Michael L Feeley, "Apocalypse Now?" Resolving India's and Pakistan's Testing Crisis' (2000) 23 Suffolk Transnational Law Review 777, 795; Article 4 of the Constitution of Jammu and Kashmir, 1957, "The territory of the State (Kashmir) shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State'.

³³¹ FO 371/129772: DY1041/177: Constitution of Kashmir (P. B Lewis, Delhi to A.A. Golds, Commonwealth Relations Office, POL. 106/4 of 5 February 1957) [NAL].

³³² *ibid.*

³³³ SCR 91, March 1951 and SCR 122, January 1957.

³³⁴ FCO 37/914: Letter from British High Commissioner (Philippa Drew) New Delhi to J.A. Birch South Asian Department, FCO, London, 27 January 1971.

The SC made it clear that the final disposition of Kashmir could not be decided by the actions of the assembly or by any party supporting the actions of the assembly. In 1957, the Pakistani Ambassador called on the Assistant Secretary to the NEA,³³⁵ Mr Talbot, to express the concerns of the Government of Pakistan over Indian actions to integrate Kashmir into India. In his response, Mr Talbot made it perfectly clear that the US position was governed by SCR 122 of 24 January 1957,³³⁶ which denounced the incorporation by India. He further remarked that other nations did not recognise India's actions that aimed to integrate Kashmir in to its territory.³³⁷ In 1963, the US also expressed deep concern over announcements from Bakshi, then-Prime Minister of the pro-Indian regime in Kashmir, about further integration. The US viewed the integration process as being likely to complicate the task of reducing tensions in the subcontinent.³³⁸

SCRS 91 (1951) and 122 (1957) indicate the legal position of the international community. These resolutions made it clear that the international community did not recognise that the JKCA had any authority to change the final status of Kashmir. It is argued that the illegal incorporation would be a key part of any 'list of attempts' to illegitimately change the final status of Kashmir. Hence, the attempt to incorporate Kashmir through India's constitution and pieces of legislation passed by the Nominated Government is illegal. The position of the international community on the Kashmir question will be discussed further in Chapter 6. India is engaged in pursuing policies in Kashmir that could be categorised as attempts to *Indianise* Kashmir. These include: the policy to suppress the language and history of Kashmir; settling non-Kashmiris in the state and encouraging them to buy properties; deporting Kashmiri people (such as Kashmiri Pundits and orphaned children) to various parts of India; and introducing laws that have a tendency to dilute the Kashmiri culture and identity of *Kashmiriyat*. It is argued that the policy of 'Indianising' Kashmir is reminiscent of patterns followed during Soviet occupations (and occupations by the Russian Empire before that), specifically the policy of 'Russification'.³³⁹ The

335 Bureau of Near Eastern and South Asian Affairs, Department of State.

336 UN Doc. S/3779, printed in Department of State *Bulletin*, February 11 1957, 232.

337 Memorandum of Conversation, Washington, 8 January 1964 in *FRUS 1963–1968*, Lyndon B. Johnson, vol XXV, South Asia (United States Government Printing Office, 2000) 1–2.

338 *FRUS*, 1961–1963, vol XIX, doc 344.

339 Simon Dixon, 'The Russians: the Dominant Nationality' in Graham Smith (ed), *The Nationalities Question in the Soviet Union* (Longman 1990) 21, 23.

policy of 'Russification' required the Russian language be used in all official matters, including higher education and government.³⁴⁰

After WWII Stalin deliberately watered down the cultural unity of the Balts by sending in waves of ethnic Russian settlers.³⁴¹ India is sending non-Kashmiris settlers to serve this purpose. In the Baltic States, the policy of deporting ethnic Balts and replacing them with Russian-speaking settlers had a deep impact. It decreased the ethnic homogeneity of the republics³⁴² and led to a fear of losing national identity as more members of ethnic minorities started to settle in the Baltic States. This led to the growth of nationalism throughout the Soviet occupied areas, reaching its peak in the late 1980s.³⁴³

Likewise, India, by employing a combined policy of deporting Kashmiri people and settling non-Kashmiris in Kashmir, is changing the demographic composition of Kashmir. This policy is aimed to assist it to legitimise its illegal seizure. However, internationally, such policies do not create legitimisation. For example in 2005, Israel's unilateral disengagement plan or 'Gaza Pull-Out plan', which removed all Israelis from the Gaza Strip and from four settlements in the northern West Bank, made it clear that settlers do not have any right to decide the future of a territory; they simply have to leave or face eviction.³⁴⁴

The influx of a large number of Indian settlers has had a devastating effect on the Kashmiri culture and language. The population transfer is threatening the Kashmiri identity of *Kashmiriyat*. It was apprehension about losing the Kashmiri identity that drove the rise of 'Kashmiri nationalism' during late 1980s. In 1989, it erupted into a violent insurrection against Indian occupation, and the struggle is still in progress.³⁴⁵ To a large extent, the insurrection in Kashmir was the result of Indianising policies.

340 Graham Smith, 'Nationalities Policy from Lenin to Gorbachev' in Graham Smith (ed), *The Nationalities Question in the Soviet Union* (Longman 1990) 6.

341 Ruta M Kalvaitis, 'Citizenship and National Identity in the Baltic States' (1998) 16 *Boston University International Law Journal* 231, 236.

342 Rein Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge 1994) 99.

343 Kalvaitis, (n 341) 237.

344 Staff, 'Jewish Settlers Receive Hundreds of Thousands in Compensation for Leaving Gaza', *Democracy Now*, 16 August 2005 <http://www.democracynow.org/2005/8/16/jewish_settlers_receive_hundreds_of_thousands> accessed 17 July 2008; 'Demolition of Gaza Homes Completed' *Ynetnews.com* (Rishon LeZion, 1 September 2005) <<http://www.ynetnews.com/articles/0,7340,L-3136516,00.html>> accessed 17 July 2008.

345 Bukhari, (n 122); Jha, (n 129) .

The incorporation of the Baltic States, like the incorporation of Kashmir, was not recognised by most Western governments, including the United States. The international community hence continued to *de jure* recognise the existence of the Baltic States up to their independence in 1991, when full diplomatic *de facto* recognition was extended.³⁴⁶ The non-recognition of India's incorporation of Kashmir by the international community provides further evidence in favour of the proposition that the ongoing occupation of Kashmir is illegal. This non-recognition also demonstrates that the integration of Kashmir into the Union of India is invalid under international law.

As the previous discussions in this chapter make clear, the process by which India has attempted to incorporate Kashmir is illegal. However, even if India considers this process legal, can anything cure the illegal occupation? In this context, the Israeli case of *Kanj Abu Salakh v. Minister of Interior*³⁴⁷ is significant. In this case, the Israeli Supreme Court, commenting on the adoption of the 'Basic Law: Jerusalem, Capital of Israel 1980' by the Israeli Knesset,³⁴⁸ held that the law did not change the internal legal situation in East Jerusalem and that it did not give Israel the right to exercise its sovereignty there.³⁴⁹ In order to affirm this position, SCR 476³⁵⁰ was passed to reconfirm that all legislative and administrative measures taken by Israel to change the status of East Jerusalem had no legal effect and constituted a flagrant violation of the Geneva Conventions.³⁵¹ In the Baltic States, newly-elected parliaments passed resolutions similar to those in Kashmir, asking for incorporation into the Soviet Union. These resolutions were readily accepted by the Soviet-installed³⁵² government. However, in the end they did not change the basic reality of occupation.

346 WJH Hough III, 'The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory' (1985) 6 New York Law School Journal of International and Comparative Law 301, 391–446.

347 37 (2) PD 718 (1983).

348 The law affirmed that a unified Jerusalem is the capital of Israel. Basic Law: Jerusalem, Capital of Israel, 27th November 2000 <http://www.knesset.gov.il/laws/special/eng/basic10_eng.htm> accessed 9 August 2006.

349 Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993) 113.

350 SCR 476 30 June 1980.

351 SCR 476 30 June 1980, para 3.

352 Smogorzewski, (n 322).

India is constantly continuing the incorporation processes with the assistance of the Pro-Indian Government. Internationally, it cannot legitimise the illegal occupation of Kashmir and will not legitimise the invalid accession. It is argued that even if India has illegally incorporated Kashmir into its union by framing laws in connivance with the Pro-Indian Government, these actions have no legal effect and do not provide India any title to the territory of Kashmir. In other words, the illegal incorporation cannot cure the illegal occupation. This argument is strengthened by the fact that the international community does not recognise Kashmir's Nominated Government or its actions.³⁵³ The legal effect of this non-recognition is that the international community does not recognise Kashmir as a *de jure* part of India. It is clear that the international community is not willing to extend recognition to the illegal occupation of Kashmir by India. In this context, Kashmir is comparable to the Baltic States, as the international community refused to recognise the validity of the Soviet incorporation of these republics.³⁵⁴ In illegal occupations, as one would expect, the government is overtaken by the occupation forces and rendered ineffective. Therefore, the actions of the installed government are not recognised due to the fact that it is a dummy unrepresentative government put in place by the occupying power. Hence, the illegal incorporation carried out with the assistance of the Nominated Government cannot cure or reverse the effect of the illegal Indian occupation.

Since it has been established that illegal incorporation cannot cure illegal occupation, it can be further argued that despite these forceful attempts at integration, the people of Kashmir have successfully kept the identity of Kashmir alive. Clearly, in states that are the victim of illegal occupation, state continuity is only made possible through the people³⁵⁵ that keep their nation alive. Since 1947 the people of Kashmir have showed resistance against the division and occupation of their territory, which shows that Kashmir is continuing through its people. Although it is difficult to measure the extent of this resistance, and while peaceful protests have continued since 1989, there has also been a continuing armed struggle against Indian occupation.

353 SCR 91, March 1951 and SCR 122, January 1957.

354 Igor Grazin, 'The International Recognition of National Rights: The Baltic States' Case' (1991) 66 *Notre Dame Law Review* 1385, 1402–03 and 1407; Arnold D McNair 'The Stimson doctrine of non-recognition' in DJ Harris, *Cases and Materials on International Law* (6th edn, Thomas, Sweet & Maxwell 2004) 219.

355 Quoted in Mälksöo, (n 312) 33–34.

In the Princely State of Junagadh and Hyderabad, which India also occupied, the people did not persist with their territorial claim. It is argued these people therefore cannot lay claim to the restoration of historical title in their respective territories and in that context, are therefore not comparable with Kashmir. In Junagadh and Hyderabad, India has established effective governance and the people have never questioned it. However, in the case of Kashmir India has never demonstrated continuous, peaceful, and effective governance, which is significant for claiming title.³⁵⁶ The right to self-determination recognises existence of 'nations' as 'peoples' despite foreign occupation.

***Unrepresentative Government and Human Rights Violations:
Claiming the Right to Self-determination and Freedom from
Occupation Under International Law***

The principle of self-determination that strings together the concepts of human rights and democracy has been recognised as an *erga omnes* right³⁵⁷ as well as a peremptory (*jus cogens*) norm.³⁵⁸ The right to self-determination in an external sense allows people to exercise their free and fair 'will' based on equal rights to determine their international status. Self-determination, therefore, includes both democracy and the respect for human rights. The denial of self-determination is therefore most likely accompanied by the presence of an unrepresentative government and a lack of democracy, as well as violations of human rights. All these factors are present in the administration of most occupied states, as occupation often begins with the use of force and military might.

The right to self-determination requires democratisation and equal participation.³⁵⁹ Democratic structures can also provide an alternative to external

356 *Palmas Case, Netherlands v. US* (1928), PCIJ, 2 R.I.A.A. 829.

357 *Case Concerning East Timor (Portugal v Australia)* [1995] ICJ Rep 90, para 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para 155.

358 Antonio Cassese, *International Law* (2nd edn, OUP 2005) 65; Raič, (n 307) 218–19; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595, para 90 (Dissenting Opinion of Judge Kreca).

359 Crawford argues that the ICJ's reliance on GA resolutions on self-determination in the cases like that of Namibia enhances the legitimacy of international law and its own legitimacy by adopting a definition that reflects the equal participation of states. James Crawford, 'The General Assembly, the International Court and Self-Determination' in

self-determination, allowing minorities or previously unrepresented people to claim equal rights and thus become 'self-governing' through democratic means.³⁶⁰ Hence, democracy can provide for internal self-determination, which is necessary for people to have meaningful participation in the process of government. The absence of democracy, on the other hand, may form part of the basis of a claim for external self-determination. Clearly, it is important to understand what constitutes unrepresentative government in an occupied territory for the claim of external self-determination, as well as to determine whether the Nominated Government in Kashmir is unrepresentative and, if so, what remedy could follow under international law.

In the post-colonial era, self-determination should not be understood as just a shield against foreign domination, but should be appreciated as having a wider application in view of its connection with human rights and democracy.³⁶¹ This is mainly because self-determination is now an international concern and remains consistent with human rights law development, which is not solely a matter that falls within a State's domestic jurisdiction.³⁶² The definition of a representative government can be derived from the 1970 Declaration which states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair ... the territorial integrity of independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples ... thus possessed of a government representing the whole people belonging to territory without distinction as to race, creed or colour.³⁶³

Vaughan Lowe and Malgosia Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Grotius Publications 1996) 585, 591; Karen Knop, *Diversity and Self-Determination in International Law* (CUP 2002) 44.

360 Hua Fan, 'The Missing Link between Self-Determination and Democracy: The Case of East Timor' (2008) 6 *Northwestern University of International Human Rights* 176, 176.

361 Hurst Hannum, 'Rethinking Self-Determination' (1993–94) 34 *Virginia Journal of International Law* 1, 67.

362 Robert McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International and Comparative Law Quarterly* 857, 865.

363 GA Res. 2625 (XXV), 24 October 1970.

This implies that only those states that 'conduct themselves in compliance with the principle of equal rights and self-determination of peoples' deserve to have their territorial integrity and political unity respected and recognised.³⁶⁴ According to the 1970 Declaration, a state in 'compliance' is protected against violations of its territorial integrity and political unity so long as its government is 'representative of the whole people belonging to the territory without distinction as to race, creed, or colour'. In the absence of such compliance, the 1970 Declaration tacitly recognises secession as a legitimate option. This, to a large extent, holds correct for Kosovo, which was an autonomous province in the former Yugoslavia and was incorporated into Serbia in 1945³⁶⁵ but remained independent from Serbia to a significant degree, with the autonomy to manage its own affairs.³⁶⁶ However, in 1989 Kosovo was politically dominated by Serbia, and in 1990 its autonomous status was redacted and its government dissolved.³⁶⁷ Serbian political repression deprived Kosovars of their civil and economic human rights³⁶⁸ leading to a resistance, violence, NATO's militarily intervention,³⁶⁹ the unilateral declaration of independence and the secession of Kosovo.

The 1970 Declaration identifies certain key principles that are inherent to representative government. Within this Declaration, it is essential for a representative government to be a democracy and to protect the human rights of the people within its territory. Although some may question the imposition of democracy as the requirement *sine qua non* for the lawfulness of the exercise of self-determination,³⁷⁰ as a general rule it is accepted that government should be based on the free consent of the population regardless of the forms or methods by which such consent is expressed.³⁷¹ Clearly, democratic

364 Mitchell A Hill, 'What the Principle of Self-Determination Means Today' (1995) 1 ILSA Journal of International and Comparative Law 119, 128.

365 Thomas W Simon, 'Remedial Secession: What the law should have done, from Katanga to Kosovo' (2011) 40 Georgia Journal of International & Comparative Law 105, 113.

366 *ibid* 112.

367 *ibid* 114.

368 Milena Sterio, 'On the Right to External Self-Determination: "Selfistans", Secession, and the Great Powers' Rule' (2010) 19 Minnesota Journal of International Law 137, 163.

369 Simon, (n 365) 114.

370 Vladyslav Lanovoy, 'Self-determination in International Law: A Democratic Phenomenon or an Abuse of Right?' (2015) 4 Cambridge Journal of International and Comparative Law 388, 398.

371 Raič, (n 307) 279.

principles require political administrations to be legitimised by the 'freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'.³⁷² Under the 1993 Copenhagen Criteria, democracy legitimises political activity, and that necessitates free and fair elections, effective public administration and judicial systems, gender equality, and respect for minorities.³⁷³ The European Commission made it clear that prospective members 'are expected not just to subscribe to the principles of democracy and the rule of law but actually to put them into practice in daily life'.³⁷⁴ Experiences across the international community show that democracy is strongly correlated with respect for human rights and, conversely, that undemocratic rulers are the worst violators of human rights.³⁷⁵ For this reason, the absence of democracy is generally associated with the violation of human rights. Therefore, unrepresentative governments are unacceptable within international law.³⁷⁶ Governments can be said to be unrepresentative when they: (1) have no stable political institutions based on democratic principles, i.e. people have no right to elect their own leaders in free, fair, contested, and regularly scheduled elections; (2) deny citizens equal participation in elections; (3) have dysfunctional administrative structures and judicial systems; and (4) do not abide by the rule of law and/or protect human rights. The presence of one or all of these shortcomings in a government would sustain the external self-determination argument. As seen, the state of democracy in Kashmir is bleak: elections are rigged, political parties with a manifesto that calls for the promised plebiscite are excluded from participating in elections, people are forced to vote under the shadow of the guns of 700,000 Indian troops, there is no free and fair political participation by the people in the creation or running of political institutions, and human

372 Vienna Declaration and Programme of Action. United Nations GAOR, World Conference on Human Rights, 48th Sess., 22d plen. Mtg. Part I, para 8.

373 EC, *Towards the Enlarged Union: Strategy Paper and Report of the European Commission on the Progress Towards Accession by Each of the Candidate Countries* (SEC (2002) 1400–12), COM (2002) 700, 13–14.

374 EC, *Agenda 2000: the Challenge of Enlargement*, COM/97/2000 final at 40; The European Commission's 'Opinion on Slovakia's Application for Membership of the EU' Bulletin of the EU Supplement 9/97, 20; Richard Burchill, 'The EU and European Democracy-Social Democracy or Democracy with a Social Dimension?' (2004) 17 Canadian Journal of Law and Jurisprudence 185.

375 Fernando R Teson, 'Two Mistakes About Democracy' (1998) 92 American Society of International Law Proceedings 126, 130.

376 *ibid.*

rights are brutally violated. For these reasons, Kashmir has remained in a state of perpetual violence and conflict since 1947.

Governor's rule has been imposed four times in Kashmir and Presidential rule has been imposed twice, which makes it clear that the current Nominated Government is not been effective and stable. This government is in power due to the presence of a huge deployment of Indian troops, as well as the use of draconian laws. For these reasons, the Pro-Indian Government is not a democratic body and does not effectively control the political, administrative, legislative and executive machinery of Kashmir. The Pro-Indian Government in Kashmir, as discussed, was nominated and installed by the GOI with the limited role of assisting in the integration of Kashmir into its union. Government officials have found themselves out of office whenever their conduct has drifted from the Indian policies on Kashmir. A recent example is the collapse of the PDP-BJP coalition government, which has been unable to stabilise Kashmir since 8 July 2016 after claims for independence resurfaced. The Indian government reacted with constant curfews and the use of military force against the people, killing many and injuring over 17,000. The government has been accused of carrying out a deliberate policy of mass blinding with the use of pellet guns.³⁷⁷ In 2008, the coalition-appointed government collapsed after their revocation of an order that transferred forest land to a non-Kashmiri Hindu organisation, the SASB, as the revocation was made due to Kashmiri protests. The GOI subsequently appointed a government that reinstated the land transfer against the wishes of the people.³⁷⁸ It is therefore clear that in Kashmir, the government is neither *for* the people nor *by* the people, and therefore it is clearly undemocratic in terms of normative international law. For Kashmir, the unrepresentative Pro-Indian Government is *for* the suppression of people and there is little input *by* the people allowed.

The situation in Kashmir involves unrepresentative government in the context of occupation and any political reform is impossible in the midst of the ongoing violent conflict. In 2008, a conference entitled 'Self-determination and Elections under Occupation' was held in Indian-Occupied Kashmir.³⁷⁹ The clear message that came across through this conference, in which an enormous number of people participated, was that people should not vote in

377 Waheed, (n 123).

378 Rahman, (n 111); See Section 5.3.1.

379 Staff, 'Don't Vote For Mufti, Abdullah, Azad: Geelani', *Greater Kashmir* (Srinagar, 21 April 2008).

elections, as 'successive Chief Ministers in the State are responsible for genocide of Kashmiris and should be tried in the International Court of Justice'.³⁸⁰ Kashmiris are caught in a complicated system of dual authority between the GOI and the Pro-Indian Government, which further diminishes any possibility of developing fair political institutions in Kashmir. In the case of Palestine, for example, advocates of democracy argue that occupation remains the most prominent obstacle to the creation of a democratic state.³⁸¹ The presence of the unrepresentative government in Kashmir provides further evidence that the state is under illegal occupation and entitles Kashmiris to exercise external self-determination with a view to restore their historical title to their territory.

As discussed in the previous section, under the 1970 Friendly Relations Declaration,³⁸² the government gains its legitimacy from the consent of the governed, and that consent is not valid unless it is given by all segments of the population.³⁸³ Buchheit describes the concept of the 'consent-of-the-governed' to mean that if a government is not representative of the whole people, it is illegitimate and in violation of the principle of self-determination. This illegitimate character of the government serves in turn to legitimise 'action which would dismember or impair, totally or in part, the territorial integrity or political unity' of the state that is violating the principle.³⁸⁴ In other words, secession becomes a legitimate option. It therefore appears that secession is possible in cases where there are gross human rights violations committed by an unrepresentative government. The acceptance of the secessions of Bangladesh from Pakistan, Bosnia-Herzegovina from Serbia, and Kosovo from Serbia show this in practice.

In *Reference re Secession of Quebec*,³⁸⁵ the Supreme Court of Canada recognised that under international law, secession is an available option to people

380 *ibid.*

381 NJ Brown, 'Evaluating Palestinian Reform' (2005) Carnegie Papers, Middle East Series, Democracy & Rule of Law Project No 59, 3 <<http://www.carnegieendowment.org/files/CP59.brown.FINAL.pdf>> accessed 21 July 2008.

382 International Law Concerning Friendly Relations and Co-operation among States, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc.A/8028 (1971).

383 Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) 93.

384 *ibid.*

385 *Reference re Secession of Quebec* [1998] 2 S.C.R. 217.

under an unrepresentative government that violates their human rights. However, the Court concluded unanimously that international law and the Canadian constitution do not afford Quebec the right to secede unilaterally, as it did not meet such criteria. This decision and the reasoning of the Canadian Supreme Court has been questioned by many academics. Carty asserts that the Canadian Supreme Court's decision does not offer any systematic explanations about the relationship between international law and constitutional law. It simply says that the right to secession cannot be exercised within the framework of existing states without negotiations.³⁸⁶ Dumberry argues that the reasoning of the Court in its assessment of the constitutional duty to negotiate and the impact it may have on international recognition is not sound. He further argues that the Court has only dealt with the *legality* of secession and not its possible *effectivity*.³⁸⁷ For these reasons, he concludes that Canadian law can only prevent the secession of Quebec legally but cannot block its accession to sovereignty if it chooses to follow a different path.³⁸⁸ It remains correct that the significance of the duty to negotiate is not well formulated within international law. Overall, the issues of whether a particular group of people is governed by an unrepresentative regime and whether they are suffering human rights violations are important factors in claims for external self-determination, and are reasonable normative standards or thresholds in cases of secession, particularly since the ICJ's Advisory Opinion on the Unilateral Declaration of Kosovo's Independence in 2010.³⁸⁹ The court had to determine whether the unilateral declaration of independence, which was declared by the Provisional Institutions of the Self-Government of Kosovo on 17th February 2008, was in accordance with international law. In paragraph 56, the Court stated that the declaration of independence did not constitute a breach of international law under UN SC Resolution 1244 (1999).

386 Anthony Carty, 'Stateless Nations and Self-Determination: A Critical Approach from International Law' (Unpublished Paper, 2008) 11.

387 Patrick Dumberry, 'Lessons learned from the Quebec Secession Reference before the Supreme Court of Canada' in Marcelo G Kohen (ed), *Secession – International Law Perspectives* (CUP 2006) 450–51.

388 *ibid* 452.

389 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010 <<http://www.refworld.org/docid/4c5151002.html>> accessed 10 October 2016.

However, there is criticism that this simplistic reasoning did not provide any guidance towards understanding the normative standards of self-determination, secession, and their relationship with constitutional law under classical, positivist international law. The main focus of the Opinion was on the SCR 1244 and the conservative legal question that was put to it. The general international laws on the right to self-determination and secession were treated marginally by the court. The crucial weakness of this opinion was perhaps that it left a door open for the use of force outside of the UN framework either by other states or by military alliances such as NATO. Clearly, for people trapped under authoritarian regimes such as in Kashmir or Palestine, the Court is suggesting that either such people should remain trapped under a repressive regime or should generate the support of a powerful military alliance, such as NATO, to gain independence. The corollary of this advisory opinion also seems to suggest that under the post-1945 international legal framework there is no cultured remedy available to people in deciding their status without massacres, which is far from truly fulfilling the promise made by the UN Charter.³⁹⁰

The domestic courts of Canada have dealt with this issue of self-determination more effectively and developed important jurisprudence in this area by considering the scope of self-determination and also the limitations of remedial secession. The Canadian court reviewed the implications of secession from a federalist perspective and ruled out any possibility of the use of force or military intervention for claiming independence. However, the ICJ Opinion by implication seemed to allow possible intervention by third party and use force. The Court pointed out:

...the illegality attached to the declarations of independence thus stemmed not from the unilateral character of these declarations as such, but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*). In the context of Kosovo, the Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against

390 *'We the peoples of the United Nations determined: to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small...'* See Preamble to the United Nations Charter, 1945.

unilateral declarations of independence may be inferred from the practice of the Security Council.³⁹¹

Following the jurisprudence of *Reference re Secession of Quebec*,³⁹² Kashmir has continually remained under an unrepresentative regime that is involved in violating human rights. Further, the progressive interpretation of the 1970 Friendly Relations Declaration allows its application to occupied people. This is mainly because the creation of a robust international human rights regime has dramatically altered international expectations about the treatment of the inhabitants of an occupied territory.³⁹³ The advent of human rights law has revolutionised international law – the state is no longer the sole focal point and individuals are no longer the ‘objects’ but rather the ‘subjects’ of international law.³⁹⁴ Human rights law has changed the ways in which governments interact with their people.³⁹⁵ The rise of human rights law and international tribunals has arguably impacted the nature of and accountability for human right violations,³⁹⁶ as governments today are under increased scrutiny for such abuses, especially *jus cogens* offences.³⁹⁷ In that sense, systematic and brutal violations of human rights can be said to be the most valid justification for claiming secession.³⁹⁸ This is also illustrated by the Kosovo case.

391 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, General List No. 141, International Court of Justice (ICJ), 22 July 2010, para 81. <<http://www.haguejusticeportal.net/Docs/Court%20Documents/ICJ/Advisory%20Opinion%20of%2022%20July%202010.pdf>> accessed 15 December 2016.

392 [1998] 2 S.C.R. 217.

393 Grant T Harris, ‘The Era of Multilateral Occupation’ (2006) 24 *Berkeley Journal of International Law*, 1, 15.

394 Jack Donnelly, *International Human Rights* (2nd edn, Westview Press 1998) 3–35.

395 Jack Donnelly, *Universal Human Rights in Theory and Practice* (2nd edn, Cornell University Press 2003) 7–13 (describing the conceptual underpinnings of human rights).

396 See Zolio A Velasco, ‘Self-Determination and Secession: Human Rights-Based Conflict Resolution’ (2014) 16 *International Community Law Review* 75, 78–81; Diane F Orentlicher, ‘International Responses to Separatist Claims: Are Democratic Principles Relevant?’ in S Macedo and A Buchanan (eds), *Secession and Self-Determination* (NOMOS XLV 2003) 22; Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (CUP 1995) 70.

397 Shirmammadov, (n 310) 75; Buchanan, (n 308) 7.

398 Shirmammadov, (n 310) 74.

After 1989, the Serbs controlled the federal and central governments in Belgrade and abolished the regional autonomy of the Kosovo Albanians. Pursuing a policy of ethnic cleansing, Milosovic called Serbs to an armed struggle against Kosovar Albanians.³⁹⁹ Around 7–9,000 Kosovar Albanians were killed and over 800,000 were displaced.⁴⁰⁰ Over time, Serbian political repression and the Kosovars' resistance took a violent shape, at which stage the Security Council intervened, calling through several resolutions for respect for human rights and an end to violence.⁴⁰¹ As it appeared impossible for the UN Security Council to do so, NATO militarily intervened to protect the Kosovar Albanians. This resulted in the NATO occupation of Kosovo and the dismantling of Serbian sovereignty. Subsequently, in 1999 Security Council Resolution 1244 was passed to set up an international authority in Kosovo, which provided a mechanism for the resolution of the conflict. Five of the six members of the Serbian leadership were later convicted for their crimes against Kosovo Albanians at the International Criminal Tribunal for the former Yugoslavia in 2009.⁴⁰² From the above discussion, India cannot justify human rights violations in Kashmir as a law and order problem. It is instead a structural issue, an entrenched system of violence that is preventing Kashmiris from reclaiming their historical title and keeping them under military occupation.⁴⁰³

Today, it is clear that human rights principles are applicable to occupied territories.⁴⁰⁴ For instance, the ICJ, in the *Construction of a Wall* case, declared that human rights laws apply to the Israeli-occupied Palestinian territories.⁴⁰⁵ Further, in *Reference re Secession of Quebec*, the Canadian Court stated that under international law, the right to secession is applicable to foreign occupation.⁴⁰⁶

399 Norman M Naimark, *Fires of Hatred: Ethnic Cleansing in Twentieth Century Europe* (Harvard University Press 2002) 150–51.

400 Marlise Simons, 'Tribunal focuses on Serbia's Kosovo war' *International Herald Tribune* (La Défense, 10 July 2006); reproduced in *the New York Times* (New York, 10 July 2006) <<http://www.nytimes.com/2006/07/10/world/europe/10iht-serbia.2166700.html>> accessed June 25 2016.

401 See, Resolution 1239 (1999) 14 May 1999S/RES/1239 <<http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Kos%20SRES1239.pdf>> accessed 2 December 2016.

402 *Prosecutor v Milutinovic et al* (Judgment) – Volume 2, IT-05-87-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 February 2009.

403 Allen Buchanan, 'Self-Determination and the Right to Secede' (1992) 45 *Journal of International Affairs* 347.

404 Eyal Benvenisti, 'Water Conflicts During the Occupation of Iraq' (2003) 97 *American Journal of International Law* 860, 862–63.

405 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J., 131 at 111–13.

406 GA. Res. 2625, 1970, Para 7; *Re Secession of Quebec* (1998) 2 SCR 217.

Keeping in view the progressive interpretation of international human rights law and the 1970 Declaration, there is not a single shadow of a doubt that Kashmiris are entitled to exercise their right to self-determination.

That said, the concepts of 'secession' and 'the end of occupation' are distinct. It is argued that secession in its traditional sense is not applicable to an occupied territory. In terms of Kashmir, India does not have any title over the territory, owing to the unjust military occupation that rests on the invalid Instrument of Accession. In Kashmir, human rights violations are committed in response to the peoples' claims for self-determination and the restoration of their historical title. In other words, in the case of Kashmir, human rights violations do not generate the original claim for the right to self-determination but it is the claim for self-determination and restoration of historical title that are responded to with human rights violations. The Pro-Indian Government in Kashmir has only become more repressive after the popular demand for freedom (*Azadi*) took the form of violent insurrection in 1989.⁴⁰⁷ The people of Kashmir have reacted to the occupation in many ways with mounting frustration, and as Puri remarks, they have been met with the massive and brutal use of disproportionate force as well as large-scale arrests.⁴⁰⁸

Under international law, the separation of Kashmir from India following Kashmir being wrongfully occupied and then constitutionally incorporated into the Indian Union cannot be described as secession. Since India has constitutionally linked Kashmir with its union, such a separation would be at the best called 'constitutional secession'. 'Constitutional secession' is not same as secession in the traditional sense,⁴⁰⁹ where the seceding entity is a formal part of the metropolitan state, e.g. Kosovo, Bangladesh, or Biafra. For Kashmir, human rights violations are the consequence of a claim to the territory that has been illegally seized by India. In the post-colonial era, the presence of an unrepresentative government and human rights violations have hence provided an additional avenue to the people of Kashmir to exercise their right to self-determination with the intention of restoring their historical title.

Conclusion

The present chapter has attempted to conceptualise Kashmir's post-1947 unlawful incorporation into the Union of India, which has not been in

407 S Kak (Director), *Jashn i Azadi (Celebrating Freedom)* Documentary on Kashmir, 2007.

408 Puri, (n 95) 31–32.

409 See generally, Hurst Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (rev edn, Pennsylvania Press 1996).

consonance with the Instrument of Accession framework. Based on this premise, this chapter examined Kashmir's exercise of self-determination outside the decolonisation context while keeping in view human rights law and the universalization of democratic principles. This chapter started off by providing an update on the current complexities of Kashmir's governance system, followed by a description and analysis of the situation regarding the application of democratic principles, ongoing political/economic human rights violations, and the unaccountable justice system that is in place. The discussions in this chapter have demonstrated that there has been a total breakdown of the democratic system, with a proxy system in its place to protect the interests of the Indian government. Further, there is almost total impunity for human rights violations, and access to the justice system remains non-existent. It is undeniable under such circumstances, as the law suggests, that people entitled to the right to self-determination must be able to exercise it freely, whether through a plebiscite, referendum, or other agreed procedure.⁴¹⁰

The legal and factual analysis of the incorporation of Kashmir suggests that India, at a domestic level, is pursuing a distorted process of legalising its doubtful title over Kashmir, which is based on the invalid IOA and the use of military might. From 1947 onwards, the Nominated Government in Kashmir has been used by India as a tool to constitutionally incorporate Kashmir into its union. The autonomy provisions in various laws, such as Article 370 of the Constitution of India (1950), the Delhi Agreement (1952), and the Constitution of Jammu and Kashmir (1957) that have been put in place with the assistance of Nominated Government are there to give a false impression on paper of the unique status of Kashmir within India.⁴¹¹ Whenever members of the Nominated Government have drifted from India's ambitions, they have found themselves out of office and even in prison.⁴¹²

In 2015, the issue of Kashmir's status under Article 370 was raised in a landmark judgement of the J&K High Court division bench.⁴¹³ The court passed the ruling on the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act 2002 and held that it couldn't be extended to the State of J&K because Parliament lacked competence to make laws that fall under Article 370 or laws that affect the interests of state

⁴¹⁰ Lanovoy, (n 370) 404.

⁴¹¹ JS Khatun, *Why has Conflict Resolution Failed in Kashmir? What are the Prospects for Peace?* (University of Manchester, Thesis No 6899, 2005) 35.

⁴¹² Bose, (n 72) 41.

⁴¹³ SLP (CIVIL) NOS. 30884–30885 OF 2015. (July 16, 2015, J&K High Court).

subjects or their immoveable properties. The Court stated that SARFAESI was in conflict with Section 140 of the J&K Transfer of Property Act and was as such inapplicable to banks/financial institutions such as the State Bank of India (SBI). Further, Section 5 of the Constitution of J&K states that it has the absolute sovereign power to legislate on matters that relate to its state subjects/citizens and their immoveable properties.⁴¹⁴ The court also stated that Article 35 (A) of the COI bars non-residents of Kashmir from buying property in J&K.⁴¹⁵ Clearly, the immediate recovery of finances under SARFAESI using coercive methods, such as seizing the immovable property of state-subject defaulters, cannot be used by the SBI. Additionally, the selling of property belonging to a permanent resident of the State to a person who is not a permanent resident of the State is not permissible due to constitutional protections. The judgement was passed after the court clubbed together about 550 loan defaulters' petitions challenging jurisdiction of the Act. As such, the Court held that J&K's 'sovereign character' couldn't be challenged or abridged. The court held the SARFAESI Act 2002 'adversely impacts the inalienable property rights of state subjects'.⁴¹⁶

However, on 16 December 2016 the Supreme Court of India, in the case of *State Bank of India vs Santosh Gupta and Anr. Etc.*,⁴¹⁷ set aside the judgement of the J&K High Court and upheld the applicability of the SARFAESI Act to

414 Section (5) The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India. (The Constitution of Jammu and Kashmir, 1956).

415 35 A of Constitution of India: Saving of laws with respect to permanent residents and their rights. Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State: (a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects – (i) employment under the State Government;(ii) acquisition of immovable property in the State;(iii) settlement in the State; or (iv) right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part.

416 Staff, 'J&K Constitution "Sovereign in Character": High Court' *Times of India* (Mumbai, 18 July 2015) <<http://timesofindia.indiatimes.com/india/JK-constitution-sovereign-in-character-High-Court/articleshow/48120034.cms>> accessed 18 December 2016.

417 Civil Appeal Nos. 12237–12238 of 2016 <<http://newsdog.today/a/article/58557004129071728aadbe6d/>> accessed 18 December 2016.

Jammu and Kashmir, stating that the State does not have absolute sovereign power due to of Article 370 and that the State of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India.⁴¹⁸

The outcome of this case demonstrates that the autonomy of Kashmir has been rendered a relic of history and as reviewed in this chapter, the consent of the 'rightful sovereigns' (the Kashmiri people) has been totally ignored during the incorporation process, which was brought about undemocratically and without considering the Kashmiri people's wishes. Political parties demanding the promised plebiscite, such as the Plebiscite Front, were barred from contesting elections and charged with treason, sedition, and subversion. Despite such state violence, the Kashmiri people's resistance to the Indian occupation over the last 70 years has remained strong and shows their 'mental continuity'.⁴¹⁹ Under international law, state continuity is also the result of their living mental-political unity and national consciousness of *Kashmiriyat*. As such even though people lack *de facto* control⁴²⁰ of the territory, Kashmir is still a 'legal entity' that exists despite occupation.

The continued presence of the undemocratic Nominated Government suggests that India has never been able to achieve effective control over Kashmir, which is necessary under international law for claiming valid title over a territory.⁴²¹ Since 1947 India was never able to effectively govern Kashmir, and failed to achieve continuous, peaceful, and undisturbed sovereignty over this territory. On the contrary, the territory has been controlled purely with the use of the armed forces, human rights violations, ethnic cleansing, and child deportation. The legislators and judges in Kashmir seem to be aware of these ongoing atrocities but even those who wish to act have no option but to accept the official denials.⁴²²

The draconian laws, such as The Armed Forces (Jammu and Kashmir) Special Powers Act 1990, were put in place to give unfettered powers to the security

418 *State Bank of India vs Santosh Gupta and Anr. Etc.*, Civil Appeal Nos. 12237–12238 of 2016 (SC).

419 Hannum, (n 409) 116; Mälksöo, (n 312) 34.

420 Crawford, (n 323) 49.

421 Jessup (1928) AJIL 735; DJ Harris, *Cases and Materials on International Law* (6th edn, Thomas, Sweet & Maxwell 2004) 187.

422 Ram Narayan Kumar, and Sonia Muller-Rappard, *Critical Reading in Human Rights and Peace* (Shipra 2006) 224.

forces to arrest without due cause and even to shoot with impunity, leading to the deaths of innocent civilians.⁴²³ The 2015 Amnesty International report on Kashmir states that the requests for permission to prosecute security personnel for their crimes were denied by the Ministry of Defence between 1990 and 2012.⁴²⁴ The 2013 report by the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions expressed concern that the sanction (or permission) provisions in India '*effectively render a public servant immune from criminal prosecution ... It has led to a context where public officers evade liability as a matter of course, which encourages a culture of impunity and further recurrence of violations*'.⁴²⁵ The European Parliament Report of 2007 also indicated that India has denied full access to international human rights organisations, including Amnesty International, Human Rights Watch, and the ICRC, in Kashmir.⁴²⁶ Although India is obligated under international law to ensure justice, truth, and full reparation to victims, it has denied these rights to Kashmiris. The Indian government has always denied the brutal human rights violations in Kashmir, which has perpetuated impunity and further human rights violations.⁴²⁷

According to the 1970 Friendly Relations Declaration, Kashmiris are subjected to 'alien subjugation, domination and exploitation'.⁴²⁸ The presence of an unrepresentative government, together with the widespread human rights violations, means that Kashmiris have the right to claim 'constitutional secession' from India. In other words, the 1970 Declaration provides Kashmiris with additional ground for claiming external self-determination and the

423 HD Petersen and OM Vedel 'Assessment of Evidence of Human Rights Violations in Kashmir' (16 September 1994) 68 (2) Forensic Science International 103.

424 Amnesty International, '*DENIED*' Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir, UK: Amnesty International Ltd, 2015 at 12 (Index: ASA 20/1874/2015).

425 Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (UN Doc: A/HRC/23/47/Add.1), 26 April 2013. <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf> accessed 15 December 2016 (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, 26 April 2013).

426 EP Report, 'Kashmir: present situation and future prospects' 2005/2242(INI), adopted on 21 March 2007.

427 Amnesty International, '*DENIED*' Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir, UK: Amnesty International Ltd, 2015 at 24–26. (Index: ASA 20/1874/2015).

428 Antonio Cassese, *Self-Determination of Peoples – A Legal Reappraisal* (CUP 1995) 90.

restoration of their historical title. The reservations by India regarding Common Article 1 of the ICCPR and ICESCR, along with the 1970 Declaration,⁴²⁹ do not negate the fact that Kashmir is an occupied territory. In fact, France, the Federal Republic of Germany, and the Netherlands have objected to the Indian reservation on the general ground that the right to self-determination applies to *all* peoples.⁴³⁰

Objectively, the presence of *occupatio bellica* allows the people of a territory to, as a whole, decide their future.⁴³¹ Moreover internationally, the forceful integration process pursued by India with the assistance of its Nominated Government has not been recognised as valid, as stated in SCRS 91 (1951) and 122 (1957). The latter affirming the former states, 'Any action that assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the assembly, would not constitute a disposition of the State'. Although the 'political will' has never been present to implement these resolutions, the United Nations continues to treat the Kashmir situation as a dispute and a threat to peace. The UN position remains that Kashmiris have a right to a legitimate say in their future.

The people of Kashmir are legitimately entitled under the 1970 Declaration and the aforementioned UN SCRS to exercise their right to self-determination to seek an end to the illegal occupation and aggression by neighbouring countries.⁴³² Drawing on the international normative framework, this chapter has attempted to assess the validity of the Indian incorporation of Kashmir within its union following its annexation. It is clear that under modern international law, 'No territorial acquisition or special advantage resulting from the threat or use of force shall be recognized as legal'.⁴³³ Additionally, the use of force and aggression cannot generate valid title to any territory.⁴³⁴ However, the power politics between and within India and Pakistan have taken over the human, social, and political realities in Kashmir and generation after generation of Kashmiris have suffered throughout the last 70 years of conflict.

429 UN Centre for Human Rights, Human Rights: Status of International Instruments at 9, UN Doc. ST/HR/5, UN Sales No. E.87.XIV.2 (1987).

430 UN Sales No E.87.XIV.2 at 9.

431 Gudmundur Alfredsson, 'Different Forms of and Claims to the Right to Self-Determination' in Donald Clark (ed), *Self-Determination – International Perspectives* (MacMillan Press 1996) 58, 61.

432 Article 7, GA Res. 3314 (XXIX), 29 GAOR Supp. No 31, at 142.

433 G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess, Supp No 28, at 121, U.N. Doc. A/8028 (1971).

434 See Clark, (n 275) 93–95.

Foreign Policy and Official International Legal Position on the Kashmir Question: A Critique

Introduction

As discussed in previous chapters, from an international law perspective the Kashmir issue is one of unlawful occupation. The people of Kashmir are being prevented from exercising their right to self-determination and restoring the historical title of their territory. The central disagreement on the Kashmir question is whether the State of Jammu and Kashmir (J&K) legitimately ceded to India and whether its terms involved the transfer of sovereignty to India. The son of the erstwhile king of Kashmir (Maharaja Hari Singh), Mr. Karan Singh (now a senior Congress leader and a member of the Rajya Sabha, the upper house of the Indian parliament) is of the view that his father signed the Instrument of Accession (IOA) with the Union of India on the basis of an agreement that the central government was to handle only defence, communications, and foreign affairs, and that the rest would be under Kashmiri control.¹ However, as discussed in Chapter 5, that agreement was not honoured by India and integration was carried out beyond the agreed subjects under Article 370 of the Indian Constitution, which completely reduced the autonomy of Kashmir.²

Today, Pakistan and India hold diametrically opposed views on the Kashmir issue. The former insists that the Kashmir question should be resolved as per the UN Security Council Resolutions, while the latter disagrees.³ Initially, India as well as the international community agreed on the need to conduct a plebiscite in Kashmir.⁴ However, over the years, India has refused to honour

1 Special Correspondent, 'Kashmir is not an internal matter of India: Karan Singh' *The Hindu* (Chennai, 11 August 2016) <<http://www.thehindu.com/news/national/Kashmir-is-not-an-internal-matter-of-India-Karan-Singh/article14562551.ece>> accessed 12 February 2017.

2 *ibid.*

3 Sisir Gupta, *Kashmir: A Study in India-Pakistan Relations* (Asian Publishing House 1967); RGC Thomas (ed), *Perspectives on Kashmir* (Westview 1992); Navnita Chadha Behera, *State, Identity and Violence: Jammu, Kashmir and Ladakh* (Manohar 2000).

4 VP Menon, *The Story of the Integration of the Indian States* (Longmans, Green and Co 1956) 390, 400. (Available at HeinOnline, Reproduction by Permission of Buffalo & Erie County Public Library Buffalo, NY).

this promise and has instead used brutal force and conducted human rights violations in Kashmir. Since the 1980s, India has been using unlawful force in Kashmir to suppress claims for the people to be given the opportunity to exercise their right to self-determination.⁵ The current Indian policy on Kashmir is to call it 'an internal matter' essentially refusing to acknowledge that it is an international dispute and that the international community has a role to play in its resolution.⁶

Under international law, a dispute is defined as 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two [international] persons'.⁷ The ICJ in its *Interpretation of Peace Treaties* Advisory Opinion stated that the existence of 'an international dispute is a matter for objective determination. The mere denial of the existence of a dispute [by a state] does not prove its non-existence.... There has thus arisen a situation in which the two sides hold clearly opposite views... Confronted with such situation, the Court must conclude that international disputes have arisen'.⁸ Since 1947, the Kashmir issue has been clearly identified as a specific and contestable dispute by the international community and India's bare denials do not prove non-existence of a dispute. As discussed in previous chapters, people in Kashmir have campaigned for the promised plebiscite to be conducted continually for the last 70 years. They have been met with military might, which has led to gross human rights violations.⁹ Under such circumstances, India maintains pseudo-political control over the territory of Kashmir. This cannot

5 Sushil Aaron, 'PM Modi's hardline Kashmir strategy suits BJP, but not India or the Valley' *Hindustan Times* (New Delhi, 7 September 2016) <<http://www.hindustantimes.com/analysis/pm-modi-s-hardline-kashmir-strategy-suits-bjp-but-not-india-or-the-valley/story-zkJdNLGMYEMafvulkvj86O.html>> accessed 10 December 2016; Ikram Ullah, 'India is Losing Kashmir' *Foreign Policy* (Washington 5 May 2016) <<http://foreignpolicy.com/2016/05/05/india-is-losing-kashmir/>> accessed 7 December 2016.

6 Special Correspondent, 'Kashmir is not an internal matter of India: Karan Singh' *The Hindu* (Chennai 11 August 2016) <<http://www.thehindu.com/news/national/Kashmir-is-not-an-internal-matter-of-India-Karan-Singh/article14562551.ece>> accessed 12 February 2017.

7 *The Mavrommatis Palestine Concessions* (1924) PCIJ Ser A No 2, 11.

8 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (1950) ICJ Rep 13.

9 Nitya Ramakrishnan, *In Custody – Law, Impunity and Prisoner Abuse in South Asia* (Sage 2013) 20; 'Kashmir's Torture Trail', Documentary Film by True Vision (Producer: Adrian Levy & Cathy Scott-Clark, Director: Jezza Neumann, Executive Producer: Brian Woods) Broadcasted on Channel Four on 10 July 2012; Allard K Lowenstein International Human Rights Clinic, *The Myth of Normalcy: Impunity and the Judiciary in Kashmir* (Yale Law School 2009).

be classified as legitimate and peaceful 'effective control' under international law.¹⁰

The contemporary security landscape in South Asia has changed since the September 11 terrorist attacks in the US. It had immediate repercussions in South Asia and on the Kashmir question after the Pakistani government agreed to assist the United States in its 'War on Terror' in Afghanistan. The Indian government saw it as an opportunity to point out to the world community that Pakistan was supporting the militancy in Jammu and Kashmir.¹¹ Since then, India has claimed that it is fighting a proxy war sponsored by Pakistan in Kashmir. For instance during the September 2016 Kashmir uprising, India launched 'surgical strikes' against Pakistan, allegedly against Pakistan-based militants at the Line of Control. Pakistan called the military action an unprovoked attack on its troops¹² resulting in unnecessary confrontation. The fact is that since the 1990s, militancy and armed conflict¹³ have been a part of the freedom struggle in Kashmir to a certain extent. However, India's attempt to reject Kashmiris' right to self-determination by labelling it terrorism¹⁴ is clearly a distortion of facts. The UN Security Council Resolutions on Kashmir even disproves India's contention. Claims about militant activity in Kashmir have been used in both Indian and Pakistani propaganda. Pakistan describes the militancy as an indigenous movement against India whereas the Indian government calls it a trans-border insurgency supported by Pakistan.¹⁵ The fact is India and Pakistan have fought four wars with each other over Kashmir (in 1947, 1965, 1971, and 1999) as well as engaging in many border conflicts and military stand-offs. They are also engaged in a nuclear-arms race.¹⁶ Obviously, the aim of their propaganda, aggression, and hostility towards each other is to assist each respective side claim title to the territory of Kashmir.¹⁷

10 *Legal Status of Eastern Greenland (Denmark. v. Norway.)* (1933) PCIJ (series A/B) No 53 (5 April), 46.

11 Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (2nd edn, I.B. Taurus 2003) xiv.

12 Staff, 'Kashmir attack: India 'launches strikes against militants' *BBC News* (London, 30 September 2016) <<http://www.bbc.com/news/world-asia-37504308>> accessed 5 December 2016.

13 Schofield, (n 11) 172, 174, 183, 196, 199, 201.

14 Aaron, (n 5).

15 Schofield, (n 11) 201.

16 See generally, Sumit Ganguly and S Paul Kapur, *India, Pakistan and the Bomb – Debating Nuclear Stability in South Asia* (Columbia University Press/Penguin 2010).

17 *ibid.*

Seeking a pragmatic approach, the present chapter evaluates the position taken by the international community on the Kashmir question in order to determine their obligations and responsibilities when it comes to resolving this 70-year-old dispute. This will be achieved by reviewing the international community's diplomatic and legal position, including the positions taken in the Security Council Resolutions on Kashmir. This chapter, apart from re-examining the position of Indian and Pakistan, will review the foreign policy and legal position of the USA, the United Kingdom, China, Russia, the European Union, the Commonwealth states, and the Organisation of Islamic Cooperation. The unilateral acts/declarations of these states/multi-state bodies on the Kashmir question show their intention, which can confer on such declarations the character of a legal undertaking, legally binding the state to follow a course of conduct that is consistent with their declarations.¹⁸ This chapter will also review whether declarations on Kashmir remain binding on states and what relevance they still have in terms of resolving the simmering Kashmir conflict. There will also be a critical legal analysis of the foreign policy adopted by the international community in order to evaluate how and why it is at variance with accepted legal positions. It must be asked whether there are any dangers in the nonchalant attitude taken in relation to the unresolved Kashmir question, which is a festering nidus of devastation in the region.

The Legal Position of the International Community on Kashmir – The UN Security Council Resolutions

In 1948, partly due to the 1947 tribal incursion into Kashmir, India approached the UN Security Council (SC) and lodged a complaint against Pakistan under Chapter VI, Article 35 of the UN Charter (UNC). For India, the issue before the SC was that Pakistan was supporting aggression against Indian sovereignty over Kashmir by allegedly supporting militants.¹⁹ In its complaint, India promised to settle the question of the final accession of J&K in accordance with the wishes of the people, but only after the invaders had been evicted from the state and normal conditions were restored.²⁰ In its counter-complaint,

18 *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Rep 253, 267, para 43; *Nuclear Tests (New Zealand v France)* (Judgment) (1974) ICJ. Rep 457, 472, para 46.

19 Letter from the Representative of India to the President of the SC (Jan. 1, 1948), U.N. Doc. S/628 (1948), in Annex 28, at 139.

20 *ibid* 141.

Pakistan challenged the legality of Kashmir's accession to India,²¹ and protested against the dispatch of Indian troops to J&K.²²

The sc, after the initial complaints, passed twenty resolutions²³ on Kashmir and also proposed two other resolutions, which were vetoed by Russia. The first statement on the Kashmir issue came in the form of SCR 38 (1948), which directed India and Pakistan to refrain from aggravating the situation. Later, SCR 39 (1948) formed a three-member United Nations Commission, later named the United Nations Commission for India and Pakistan (UNCIP). UNCIP had a duty to investigate the situation that gave rise to the Kashmir issue, employing any mediatory authority likely to reduce complications, and to report on the progress of any actions taken to implement the advice and directions of the sc. Lord Birdwood's account of the negotiations leading to UNCIP reveal two interesting facets: firstly, there was no effort by either side to pursue an 'all-Kashmiri settlement',²⁴ and secondly, Pakistan had accepted every proposal that the UN had previously submitted. There was a strong feeling among the Pakistani delegation that they had compromised significantly on India's claim that they needed to maintain a large force after all Pakistani troops had withdrawn to prevent any Pakistani attack. The Indian position, however, remained fixed on the need to maintain their sovereignty over all of Kashmir including under the Pakistani Occupied Kashmir.²⁵

In this context, the first dispute that arose between India and Pakistan was over the title given to the Kashmir question on the agenda of the sc. The Minister of Foreign Affairs of Pakistan, Mr Zufrullah Khan, in a letter to the President of the sc, requested him to change the title of the agenda regarding the Kashmir question from 'The Jammu and Kashmir question' to the

21 Letter from the Minister for Foreign Affairs of Pakistan to the Secretary General (Jan. 15, 1948), U.N. Doc S/646 & Corr. 1 (1948), Annex 6, 67.

22 *ibid* 72.

23 UNSCR 38 (17 January 1948); 39 (20 January 1948); 47 (21 April 1948); 51 (3 June 1948); 80 (14 March 1950); 91 (30 March 1951); 96 (10 November 1951); 98 (23 December 1952); 122 (24 January 1957); 123 (21 February 1957); 126 (2 December 1957); UNCIP SCR, 13 August 1948; UNCIP SCR 5 January 1949; SCR 209 (4 September 1965); 210 (6 September 1965); 211 (20 September 1965); 214 (27 September 1965); 215 (5 November 1965); 303 (6 December 1971) and 307 (21 December 1971).

24 Christopher Birdwood, *India and Pakistan: A Continent Decides* (Frederick A Praeger 1954) 262.

25 *ibid* 262–63.

'India-Pakistan question'.²⁶ Pakistan's aim was to add in the situation in Junagadh, which was a part of Pakistan's territory that was occupied by Indian armed forces.²⁷ However, the leader of the Indian delegation to the SC, Mr Ayyangar, objected to such a proposal.²⁸ The Representative of the UK at the SC, Mr Baker, agreed that the question of Kashmir should be kept separate from Junagadh and other disputes between the two countries.²⁹ Nevertheless, the name on the agenda regarding the Kashmir question was changed to the India-Pakistan question.

After international deliberations SCR 47 (1948) was passed, which became the principal point of reference for subsequent international efforts to solve the Kashmir question.³⁰ This resolution set forth a two-part recommendation calling for demilitarisation and a plebiscite. It called for Pakistan to secure the withdrawal of all tribesmen and troops, as well as the withdrawal of the majority of Indian troops.³¹ After demilitarisation was achieved, a UN Plebiscite Administrator would be appointed and the Kashmiri people would be able to determine their future.³² In July 1948, UNCIP conducted deliberations and arrived at a proposal that called for a ceasefire and troop withdrawals. However, India rejected this proposal on that basis that they considered Pakistan the aggressor in Kashmir and wanted the proposal to reflect this. India found this resolution, 'unreasonable' and refused to co-operate in its implementation.³³ Pakistan on the other hand was worried that the interim administration under Sheikh Abdullah and the remaining Indian troops would influence the plebiscite.³⁴

26 Letter from the Foreign Minister of Pakistan to the President of SC (20 January 1948) UN Doc S/655.

27 *ibid.*

28 Quoted in UNSCOR, 231st Mtg (22 January 1948) 143–164 at 144.

29 *ibid* 148.

30 UNSCR 47 (21 April 1948).

31 *ibid* paras A 1 (a) & A 2 (a).

32 *ibid* para B (7); Ali Khan, 'The Kashmir Dispute: A Plan for Regional Cooperation' (1994) 31 *Colum. J. Transnat'l L.* 495, 513.

33 Josef Korbel, *Danger in Kashmir* (Princeton University Press 1954) 139, 112; Christopher Birdwood, *Two Nations and Kashmir* (Robert Hale 1956) 67–78; Michael Brecher, *The Struggle for Kashmir* (OUP 1953) 27–33.

34 Wajahat Ahmad, 'Kashmir And The United Nations' (*Counter Currents*, 27 August 2008) <<http://www.countercurrents.org/ahmad270808.htm>> accessed 17 February 2017.

The subsequent SCRs reiterated the demilitarisation and plebiscite provisions of SCR 47.³⁵ The UNCIP resolutions of 13 August 1948 and 5 January 1949 were particularly notable. In the 13 August 1948 resolution, UNCIP emphasised the need for negotiations to achieve demilitarisation in the State of J&K. Both these resolutions repeated the provisions of SCR 47 and reaffirmed that the future status of the State of J&K would be determined in accordance with the 'will of the people'. The UNCIP resolution of 5 January 1949 further stated that 'the question of the accession of the State of J&K to India or Pakistan will be decided through the democratic method of free and impartial plebiscite'.³⁶ The UNCIP resolution of 13 August 1948 further proposed that, upon their acceptance of a truce agreement, India and Pakistan would enter into consultations with UNCIP to determine fair and equitable conditions for holding a plebiscite. Overall, while India was in favour of Pakistani troops being withdrawn first, they did not agree with the characterisation of the conflict, as they considered Pakistan the aggressor. For their part, Pakistan attached so many reservations to the acceptance of this resolution that the UNCIP regarded it 'as tantamount to rejection'.³⁷ Field Admiral C.W. Nimitz was appointed as the Plebiscite Administrator under the UNCIP Resolution of 5 January 1949, but India refused any plebiscite and pleaded that Pakistan should be treated as an invader.³⁸ Despite the disagreements between India and Pakistan as to demilitarisation, the two states acquiesced to a ceasefire agreement on 1 January 1949 brokered by the UN Commission. On 27 July 1949, India and Pakistan reached an agreement on the demarcation of the ceasefire line.³⁹ Thereafter, the first UN Military Observer Group in India and Pakistan (UNMOGIP) was deployed in Kashmir to supervise the implementation of the ceasefire. SCR 91 later authorised the continued supervision by UN troops, resulting in a *de facto* partition of the state. UNMOGIP is still functional in Kashmir.

However, India gradually backed away from its commitments to the international community and began its campaign, as discussed in the previous chapter, to integrate Kashmir into its union through Kashmir's constitution. India created the Constituent Assembly for J&K for the purpose of obtaining

35 UNSCR 91(30 March 1951), 96 (10 November 1951), 98 (23 December 1952) 122 (24 January 1957) & 126 (2 December 1957).

36 UNCIP (5 January 1949) para 1.

37 Korbelt, (n 33) 145.

38 Majid Siraj, *Towards the Peace in Jammu, Kashmir & Ladakh* (Manas Publications 2003) 45.

39 Agreement Regarding the Establishment of Cease-Fire Line in the State of Jammu and Kashmir (27 July 1949) 81 UNTS, 273.

legal acquiescence for this, and sought the support of a local political party, the 'All Jammu and Kashmir National Conference'. The J&K Constituent Assembly was given the task of drafting the new constitution of Kashmir in 1950. On 30 March 1951 the SC passed Resolution 91, which stated that the international community refused to recognise any action by the Constituent Assembly that attempted to determine the final shape and affiliation of the State of J&K.⁴⁰ In violation of SCR 91, the nominated pro-Indian J&K Constituent Assembly adopted a constitution for the entire State of J&K, which came into force in January 1957, and claimed that the State of J&K was integral part of India.⁴¹ SCR 122 which was passed on 24 January 1957, declared that the act of creating a new constitution for Kashmir was invalid.⁴²

The breach of the SCRs by India prompted the UK, USA, Australia, and Cuba to move the draft Four-Powers Resolution of 15 February 1957 in the SC. This Resolution was moved under Chapter VII and provided for a temporary UN Force for Kashmir in order to secure demilitarisation. India rejected the Resolution and on 21 February 1957, the Soviet Union vetoed it.⁴³ This SCR would have been significant as it consented to the 'use of force' to the extent that it was necessary to achieve demilitarisation as envisaged by the UNCIP resolutions.⁴⁴ The idea of the international community using force in Kashmir was floated within international circles as early as 31 December 1947.⁴⁵ Even while rejecting the Resolution on 21 February 1957, the Soviet Representative at UN, Mr. Sobolar, stated in his address that 'we cannot overlook the fact that the idea of a plebiscite has been objected, in fact rejected by one party'.⁴⁶ On 22 June 1962, another draft Resolution was submitted by Ireland to the SC, under Chapter VII of UNC (sometimes referred to as the Irish Resolution), which reminded the parties of the UNCIP resolutions calling for demilitarisation and a plebiscite.⁴⁷ The USA, UK, France, China, Ireland, Chile, and Venezuela favoured this Resolution but the USSR vetoed it. This draft Resolution and the support for

40 UNSCR 91 (30 March 1951).

41 FO371/129777: DY1041/46 (E): Outward Telegram from Commonwealth Relations Office to UK High Commissioner in Canada, Australia, India and Pakistan, 16 February 1957 [NAL].

42 UNSCR 122 (24 January 1957) para 1.

43 Draft UNSCR (20 February 1957); Draft UNSCR (22 June 1962); *FRUS, 1955–1957* vol VIII (South Asia) (United States Government Printing Office, Washington, 1987) 51; Krishna Kant Misra, *Kashmir and India's Foreign Policy* (Chugh Publications 1979) 400.

44 Draft UNSCR (20 February 1957); Draft UNSCR (22 June 1962).

45 IOR L/WS/1/1148–1155, 1947–1949; Top Secret Memo from the UK [BL].

46 FO 371/129765/ (DY1041/160): Foreign Office, Political Departments: General Correspondence from 1906–1966 [NAL].

47 Draft UNSCR (22 June 1962).

it showed that most of the permanent SC members favoured the use of the UN forces to achieve demilitarisation in Kashmir, as this was a prerequisite to holding a plebiscite.

More SCRs were passed regarding India and Pakistan after the wars of 1965⁴⁸ and 1971,⁴⁹ which only partly defused the hostilities between the two countries. In the aftermath of the 1965 war, the Soviet Premier A. Kosygin initiated bilateral talks and invited PM Shastri of India and President Ayub Khan of Pakistan to Tashkent. This resulted in the Tashkent Agreement, which was signed on 10 January 1966. It committed India and Pakistan to 'peaceful relations' and 'to promot[ing] understanding and friendly relations between their peoples'. This bilateral agreement was not respected for long and the third Indo-Pakistani war took place in 1971. The war of 1971 replaced the ceasefire line with the 'Line of Control' that now divides the State of J&K into two parts.⁵⁰ It was followed by signing of the Simla Agreement between the two countries in 1972. After the signing of this agreement, it was decided that India and Pakistan would solve their issues through bilateral negotiations.⁵¹ However, as the ongoing conflict shows, these efforts have neither been successful nor always sincere.

In looking at the root cause of the present deadlock, we see that the UN SC failed to negotiate the demilitarisation and plebiscite through the UNCIP or individual UN representatives⁵² and that India and Pakistan both remain determined to hold on to their unlawful territorial gains in Kashmir which has led to the current *status quo*. A pragmatic approach suggests that it is not desirable to attempt to categorise the degree of seriousness in terms of its unlawfulness of conduct or proportionality of that conduct between Indian and Pakistani occupation of Kashmir, as both remain illegal within international law. Hence best is to steer a middle course between the two unacceptable positions and give preference to the SCRs, which were passed with the backing of the international community under Chapter VI of UNC and remain binding on India and Pakistan. In the ICJ Advisory Opinion in the *Namibia* Case, the Court disagreed that Article 25 applies only to Chapter VII and insisted that the SC's

48 UNSCR 209 (4 September 1965), 210 (6 September 1965), 211 (20 September 1965), 214 (27 September 1965) & 215 (5 November 1965).

49 UNSCR 303 (6 December 1971) & 307 (21 December 1971) para 2.

50 Richard Sisson and Leo E Rose, *War and Secession: Pakistan, India and the Creation of Bangladesh* (University of California Press 1990) 5, 234.

51 The Simla Agreement (2 July 1972).

52 Like General McNaughton (Canada); Owen Dixon (Australia); Frank Graham (United States); Gunnar Jarring (Sweden), all of these UN Representatives for India and Pakistan failed in their mission.

mandatory powers can be exercised beyond the limits of Chapter VII of the UNC.⁵³ This discussion therefore makes it obvious that the SCRs on Kashmir are binding on the international community, including India and Pakistan, as they have affirmed their eagerness to accept them. The situation remains whether or not the Kashmir question is on the UN SC list of Matters.⁵⁴ The purpose of removing items was to 'improve its documentation'.⁵⁵ Hussain argues that the removal of an item from the list has no implications for the substance of the matter.⁵⁶ Furthermore, it does not stop the Member States from bringing the matter to the attention of the SC in conformity with Article 35, which is made clear by the Note itself.⁵⁷ However, it is also true that SC resolutions passed under Chapter VI of the UNC are feeble in terms of enforceability.

A Brief Outline of the Legal Positions of India, Pakistan, and Other States on the Kashmir Question – A History of Diplomatic Efforts

Even before the SC became involved, India and Pakistan had legally committed themselves to demilitarisation and to conducting a plebiscite in Kashmir. The SCRs cemented this legal commitment. The Indian legal position until the early 1950s was that there should be a plebiscite in Kashmir. The Prime Minister of India, Nehru, wrote a letter while in London dated 9 February 1951 to the Prime Minister of Kashmir stating: 'I have no doubt that the will of the Kashmiri people must prevail in regard to every matter and it is they who will decide ultimately every question affecting the State'.⁵⁸ India, accepting the proposal for a plebiscite, agreed that by 30 April 1954 a plebiscite administrator would be appointed for this purpose.⁵⁹

53 *Namibia Case* (1971) 1CJ Rep 51; Nigel D White, *The Law of International Organisations* (Manchester University Press 2005) 165; *Corfu Channel Case* (Preliminary Objection) (25 March 1948) 1CJ 15; Harding F Bancroft and Eric Stein, 'The Corfu Channel Case: Judgment on the Preliminary Objection' (1949) 1 *Stanford Law Review* 646, 650.

54 S/1996/603/Corr.1 (2 August 1996).

55 *ibid.*

56 Ijaz Hussain, *Kashmir Dispute- An International Law Perspective* (Quaid-I-Azam University 1998) 219.

57 S/1996/603/Corr.1, 2 (2 August 1996).

58 ACC No 545: *India and Kashmir – Constitutional Aspect* (Ministry of Information and Broadcasting Jammu and Kashmir Government 1963) 5 [JKA (S)].

59 Norman D Palmer, 'The Changing Scene in Kashmir' (1953) 22(12) *Far Eastern Survey* 157, 157.

Pakistan has always been committed to the conduct of the plebiscite in Kashmir.⁶⁰

However, India changed its foreign policy in the latter part of the 1950s and reneged on conducting the plebiscite.⁶¹ They alleged that the UK was party to almost all the resolutions on Kashmir that were unacceptable to India.⁶² Indian representatives even believed that British officers serving in Pakistan may have directly or indirectly assisted the tribal invasion of Kashmir.⁶³ The current Indian government sees Kashmir as a closed chapter and as an integral part of India. In 2006, Musharraf suggested a four point proposal that envisaged setting up Kashmir with the current borders but allowing free movement of people in the region, self-governance or autonomy without independence, withdrawal of troops in a staggered manner, and a joint supervision mechanism with representatives from India, Pakistan, and Kashmir.⁶⁴ However, India rejected the proposal. The fact remains that neither India nor Pakistan demilitarised the territory of Kashmir under their respective occupation in order to facilitate a plebiscite. Although Pakistan stands by their commitment to demilitarise and the solution presented by former Pakistani President Musharraf reflects this, their declarations have not been backed up by any specific pragmatic implementation plan by subsequent governments.⁶⁵

Within India, the Kashmir issue is mostly portrayed by media and academics alike as a domestic matter or, at most, an Indo-Pakistani dispute⁶⁶ created by Pakistan. In this narrative, Kashmiri people's right to self-determination or the protection of their human rights is not prioritised.⁶⁷ The Indian scholars' main

60 Staff, 'OIC Extends Support to the People of Kashmir' *The Hindu* (Chennai, 16 March 2008); HS Gururaj Rao, *Legal Aspects of the Kashmir Problem* (Asia Publishing House 1967) 337.

61 FO 371 129767: DY1041/82: Statement by Mr Nehru. India's offer for a plebiscite was 'strictly conditional' (Delhi telegram 114 of February 1957).

62 Misra, (n 43), 398.

63 *ibid* 398.

64 Staff and agencies, 'Musharraf offers Kashmir "solution"' *The Guardian* (London, 5 December 2006) <<https://www.theguardian.com/world/2006/dec/05/pakistan.india>> accessed 10 December 2016.

65 The plan has come under some derision from the Indian press. PTI, 'Pakistan PM Nawaz Sharif raises Kashmir issue with world leaders amid isolation fears' *Indian Express* (Noida, 21 September 2016) <<http://indianexpress.com/article/world/world-news/pakistan-pm-nawaz-sharif-raises-kashmir-issue-with-world-leaders-amid-isolation-fears-3041883/>> accessed 18 February 2017.

66 Iffat Sana Malik, *Kashmir: Domestic Insurgency, International Dispute* (OUP 2002).

67 See generally, Sumit Ganguly, 'Will Kashmir Stop India's Rise?' (2006) 85 *Foreign Affairs* 45; Menon, (n 4).

focus remains on the insurgency in Jammu and Kashmir, or Pakistan's 'proxy-war',⁶⁸ which they allege has been continually supported since the early 1980s by the Inter-Services Intelligence (ISI) of Pakistan. The main allegation is that the ISI have been training Islamist insurgents, such as *Mujahideen* and Jihadist movements, within Kashmir.⁶⁹ The Indian government also denies that their policies and actions in Kashmir since 1947, including the banning of political parties calling for the promised plebiscite, army brutality, state terrorism, human rights violations, and an overall failure to provide democratic channels to address the concerns of Kashmiris, have acted as catalysts for insurgency.

The United States of America

During the Truman Administration (1949–1953) Dean Gooderham Acheson, the US Secretary of State, played a central role in defining American foreign policy and its role in the Cold War. During Acheson's stay in office, Washington held India responsible for its failure to hold a plebiscite in Kashmir. During the 1950s, aware of the 'serious implications' of the Kashmir issue,⁷⁰ Acheson was convinced that India's insistence on its legal right to Kashmir was not useful in the prevailing circumstances and that greater flexibility was needed on India's part.⁷¹ Acheson, in a personal message to Mr Ernest Bevin, the British Secretary of State for Foreign Affairs, observed:

It is unthinkable that these two members of the Commonwealth should reach a stalemate in negotiations when both parties have agreed on the ultimate object that the fate of Kashmir shall depend upon the freely expressed will of the people.⁷²

68 PTI, 'Kashmir unrest: Separatists fighting Pakistan's "proxy war" in the Valley, says BJP' (FirstPost 6 September 2016) <<http://www.firstpost.com/india/kashmir-unrest-separatists-fighting-pakistans-proxy-war-in-the-valley-says-bjp-2993184.html>> accessed 20 September 2016.

69 See for example, Tufail Ahmad, 'Al-Qaeda and Pakistan's ISI are one and the same: Their differences over Kashmir is a smokescreen' (FirstPost, 26 September 2016) <<http://www.firstpost.com/india/al-qaeda-and-pakistans-isi-are-one-and-the-same-their-differences-over-kashmir-is-a-smokescreen-3020556.html>> accessed 17 February 2017.

70 *Memorandum of Conversation by the Secretary of State*, [Washington] January 6, 1950 in *FRUS*, 1950, vol v, The Near East, South Asia, and Africa, 1978 1365.

71 John T McNay, *Acheson & Empire: The British Accent in American Foreign Policy* (University of Missouri Press 2001) 111.

72 *The Secretary of State to the Embassy in the United Kingdom* (Washington, 6 January 1950) in *FRUS*, 1950, vol v, The Near East, South Asia, and Africa, 1978 1365–66.

In a letter to the US Representative at the UN, Austin, Acheson stated that the most reassuring move for the people of the subcontinent and the rest of the world would be for there to be an agreement on a program for the demilitarisation of Kashmir.⁷³ In 1952 the acting chairman of the US delegation to the UN, Eleanor A Roosevelt, informed the Prime Minister of Kashmir, Sheikh Abdullah, that the SC wished to deal with the Kashmir issue by encouraging compliance with the agreement to demilitarise.⁷⁴

American policy on Kashmir was influenced by the Cold War and when Roosevelt was not able to persuade India to join an anti-communist pact, she turned to Pakistan⁷⁵ and in 1954 entered into a Mutual Defence Assistance Agreement with them. In 1955, Pakistan joined the South East Asian Treaty Organisation (SEATO)⁷⁶ and the Central Treaty Organisation,⁷⁷ which alarmed India. In 1964, US support for Pakistan's position varied: for example, on 21 January, a telegram was sent from the Department of State saying that the US was not in a position to offer support at this time.⁷⁸ However, on 30 January 1964, a telegram from Ambassador Bowles to Harriman stated that the Department would work to win support, first in India and then in Pakistan, for an autonomous Kashmir.⁷⁹ The then-Prime Minister of Pakistan, Mr Suhrawardy, also received private assurances in Washington that Pakistan could count on the US's sympathy in its dispute with India and 'firm moral backing' on Kashmir and the Canal Water problems.⁸⁰

73 *ibid.*

74 *The Acting Chairman of the United States Delegation to the General Assembly (Roosevelt) to the Department of State Paris* (6 February 1952) in *FRUS*, 1952–1954, vol XI, pt I (1983) 1185.

75 V Longer, *The Defence and Foreign Policy* (Sterling Publishers Private Ltd 1988) 43.

76 SEATO, created by the Southeast Asia Collective Defense Treaty or the Manila Pact, was an international organisation for collective defence established on 8 September 1954. It was dissolved on 30 June 1977.

77 The Central Treaty Organization (original name, Middle East Treaty Organization or METO), also known as the Baghdad Pact, was adopted in 1955 by Iraq, Turkey, Pakistan, Iran, and the United Kingdom.

78 Telegram from the Department of State to the Embassy in Pakistan, Washington (21 January 1964) in *FRUS* 1963–1968, Lyndon Johnson, vol xxv, South Asia (2000) 16.

79 Telegram to the Department of State, Washington (30 January 1964) in *FRUS* 1963–1968, Lyndon Johnson, vol xxv, South Asia (2000) 16.

80 FO 371/129777: DY1041/306D: Inward telegram to Commonwealth Relations Office, from UK High Commission in Pakistan.

In this context, relations between the US and India involved a great deal of mistrust because India believed that the US favoured Pakistan.⁸¹ It was even alleged by certain critics that the US was interested in getting Kashmir for itself.⁸² It was also alleged that the US, apart from extending help to Pakistan, was attempting to strengthen the opinionated and ambitious Sheikh Abdullah by offering him an independent status for Kashmir.⁸³ These allegations about a conspiracy resulted in the arrest of Abdullah, who was sent to prison for waging war against the sovereignty of India.⁸⁴

In the 1990s, during the Clinton administration, American policy was sympathetic to the people of Kashmir. Both the House of Representatives and the Senate deplored the use of violence and torture by Indian security forces against civilians and demanded access to Kashmir for media and human rights organisations.⁸⁵ The House of Representatives also affirmed that the future status of Kashmir was to be decided through a plebiscite.⁸⁶ In October 1993, there was a diplomatic crisis when the new US Assistant Secretary of State for South Asia, Robin Lynn Raphael, while replying to questions from journalists, said:

We view Kashmir as disputed territory and that means, *we do not recognise that Instrument of Accession* as meaning that Kashmir is forevermore an integral part of India.⁸⁷ (Emphasis added)

This statement created turmoil in Indian political circles, which was aggravated in February 1994 when President Clinton expressed concern over the

81 Telegram from the Embassy in India to the Department of State, New Delhi (20 February 1964) in FRUS 1963–1968, Lyndon Johnson, vol XXV, South Asia (2000) 16, 35.

82 SP Venkataraman, *American Policy towards India-The Present Phase* (New Literature 1959) 1.

83 Quoted in Misra, (n 43) 415.

84 *The Observer* (London 16 September 1962); *Guardian* (London 19 September 1962) and *The Times* (London 20 September 1962).

85 House of Representatives Resolution, H Res. 87 of 22 February 1991 & Senate Resolution S Res. 91 of 21 March 1991.

86 *ibid.*

87 Hassan Abbas, *Pakistan's Drift into Extremism – Allah, then Army, and America's War on Terror* (ME Sharpe 2004) 153; Raymond Cohen, *Negotiating Across Cultures: International Communication in an Interdependent World* (rev edn, US Institute of Peace Press 1997) 48; Subhash Kapila, 'United States Obsession with the Kashmir Issue: An Analysis' (2002) South Asian Analysis Group Paper no 403.

abuse of human rights by the Indian Army in Kashmir.⁸⁸ At a press conference, the President stated that there had been no change in US policy vis-à-vis their criticism of India's human rights violations in Kashmir.⁸⁹ In 2000, the US State Department's Human Rights Report noted that the Indian security forces were responsible for 'significant human rights abuses' in J&K.⁹⁰

During the beginning of the Bush Jr. era the political priorities of the US shifted, first to economic freedom and finally to the fight against terrorism. In the current political setting, the US needs both India and Pakistan on their side. The US is building a global strategic partnership with India, the world's largest democracy, and is looking at all the areas where its international interests including agricultural and other economic priorities as well as education, science, technology, and the promotion of democracy,⁹¹ can be advanced. On the other hand, the US continues its long friendship with Pakistan, a key ally in the war on terrorism.⁹² A friendly relationship between India and Pakistan is seen as essential for peace in the region as well as for securing America's economic interests. To this end, America has helped to entrench the policy of bilateralism in the subcontinent, thereby overriding the interests of the people in Kashmir.

However, while the Obama administration indicated that they would address the issue of Kashmir and reprimanded India for reneging on the promise of a plebiscite, causing concern in Delhi, ultimately no serious action was taken.⁹³ At the moment, America encourages the 'Composite Dialogue' between India and Pakistan on Kashmir, but does not seek a role as a mediator.⁹⁴ Despite the change in their foreign policy, the US still recognises the whole of

88 Cohen, (n 87) 48.

89 Joint Press Conference of President Clinton and Pakistani PM Benazir Bhatto (11 April 1995) <<http://www.presidency.ucsb.edu/ws/?pid=51220>> accessed 5 December 2016.

90 John Gershman, 'Overview of Self-Determination Issues in Kashmir' (*Foreign Policy in Focus* 2001) <<http://www.kingscollege.net/bahcheli/231%20website/Kashmir%20&%20self-determination.pdf>> accessed 5 December 2016.

91 U.S. Department of State, 'US Foreign Policy in the 21st Century' (2006) 11 (3) Foreign Policy Agenda 30.

92 *ibid.*

93 ZG Muhammed, 'Kashmir: Obama's Failure' *Greater Kashmir* (Srinagar, 12 June 2016) <<http://www.greaterkashmir.com/news/opinion/story/220221.html>> accessed 10 December 2016.

94 Email from Tim Fitzgibbons to author (14 November 2007).

Kashmir as a disputed territory and considers Indian Occupied Kashmir 'under *de facto* control of India'.⁹⁵

The United Kingdom

The world views the Kashmir problem as a legacy of the British Raj. In 1948, at the drafting stage of one of the most significant SCRs on Kashmir, there was a flurry of activity in the background. The US Secretary of State, in a telegram to the British Foreign Office, asked about the legal right of the SC to suggest sending Pakistani troops into Kashmir on the assumption that India would be invited to agree or that such a solution might be carried out without Indian consent. How far would the SC have the right to question the validity of Kashmir's accession to India?⁹⁶ Responding to this issue, Mr Mason, on behalf of UN Political Department, described the SC as more than a 'policeman' that can 'impose a solution'.⁹⁷ On the question of the validity of the IOA, Mason stated that the SC would be ill-advised to contest the matter unless it was prepared to ask the International Court to go into the history of the events carefully and to give an advisory opinion, but that this should not deflect it from considering what the best way would be to secure a lasting settlement.⁹⁸

Commenting on the same questions, Sir G Fitzmaurice, Foreign Office Legal Adviser, noted that the role of the SC is to restore of peace and security, and on the question of introducing Pakistani troops into Kashmir, he remarked that:

Without any dissenting vote on the part of one of the great Powers, I do not think there can be any doubt about the legal right of the SC to come to a decision in that sense, *irrespective of India's consent...* and if Pakistani troops are the only ones available, then as I read Article 39–42 of the Charter then there can be no doubt about the right of SC to decide on their introduction.⁹⁹ (Emphasis added)

95 The India Reciprocity Schedule with America, US Department of State <<https://travel.state.gov/content/visas/en/fees/reciprocity-by-country/IN.html>> accessed 5 December 2016].

96 FO 371/69710, Kashmir, 25 February, 1948: The Washington telegram No 862 from the US Secretary of State, South East Asia Department to the British Foreign Office.

97 *ibid.*

98 *ibid.*

99 *ibid.*

He further affirmed that Kashmir was an independent sovereign state after the lapse of paramountcy.¹⁰⁰ The UK sought support from the US on using UN forces and the induction of the plebiscite administrator,¹⁰¹ though it hedged on the question of getting the ICJ involved, as proposed by the Swedish Foreign Minister in 1957.¹⁰² The worry was that the Kashmir question was a political problem and not simply a legal one, and that it might be extremely embarrassing for Britain to have to give evidence on confidential matters relating to the advice given by the viceroy to the princes.¹⁰³

During the 1990s, after armed insurrection gripped Kashmir, British public opinion became highly sympathetic to the Kashmiri cause. Sir Gerald Bernard Kaufman, the Shadow Foreign Secretary, launched a campaign that culminated in the Labour Party adopting a resolution on Kashmir at the annual party conference in 1995.¹⁰⁴ Commenting on this resolution, Schofield notes that it was a genuine initiative aimed at ending the violence and suffering in Kashmir and finding a just and lasting peace settlement. The resolution categorically stated that Britain 'must accept its responsibility as the former imperial power in a dispute that dates from the arrangements for independence'.¹⁰⁵

Recent British governments have held broad views on the Kashmir issue, encouraging India and Pakistan to build on the UN SCRs and 'find through dialogue' a just and lasting solution acceptable to the people of Kashmir,¹⁰⁶ as reinforced by Mr Blair in the joint statement with General Musharraf on 7 December 2004.¹⁰⁷ The UK also encouraged respect for the human rights of the people of Kashmir.¹⁰⁸ In 2004, Baroness Crawley emphasised that the

100 FO 371/69710: Foreign Office Minutes, Mr Fitzmaurice, 'Validity of Kashmir's Accession to India', 25 and 27 February 1948.

101 FO 371 129767: DY1041/72(B): Outward Telegram from Commonwealth Relations Office 1957 [NAL].

102 FO 371/129777: DY1041/46(A): Outward Telegram from Commonwealth Relation Office to UK High Commissioner in Australia, India and Pakistan, Dated 26 January 1957 [NAL].

103 FO 371/129777: DY1041/46(C): Outward Telegram from Commonwealth Relations Office to UK Commissioner in Australia, India and Pakistan, 2 February 1957 [NAL].

104 Quoted in Suri, 'Blair got the wrong introduction to India' *Indian Express* (Noida, 5 May 1997). However, on request, a copy of this resolution could not be located by the office of the Labour Party. Email from Alice Macdonald to the author (1 April 2008).

105 Victoria Schofield, 'Kashmir – Today, Tomorrow?' (1997) 28 *Asian Affairs* 315, 315–16.

106 HCD (10 June 2002) cc 595–613.

107 'UK and Pakistan State Common Position: Full Text of the Joint Statement' 10 Downing Street (12 July 2004).

108 Bowers, *Kashmir* (Research Paper 04/28, International Affairs and Defence, HCL, 30 March 2004) 41.

views of Kashmiris must be taken into account if any settlement is to last.¹⁰⁹ In November 2016, the UK Foreign Secretary, Boris Johnson, called for India and Pakistan to resolve the Kashmir issue and become an 'incredible boomzone', expressing concerns about the impact of 'mutual sequestration' on the economies of both countries. He also expressed concern about civilian deaths.¹¹⁰

In January 2017, a British Conservative parliamentarian, David Nuttall, the MP for Bury North and the Chairman of the All-Party Parliamentary Kashmir Group¹¹¹ called for a debate in the House of Commons on Kashmir on the motion that:

This House notes the escalation in violence and breaches of international human rights on the Indian side of the Line of Control in Kashmir; calls on the Government to raise the matter at the United Nations; and further calls on the Government to encourage Pakistan and India to commence peace negotiations to establish a long-term solution on the future governance of Kashmir based on the right of the Kashmiri people to determine their own future in accordance with the provisions of UN Security Council resolutions.¹¹²

Clearly, the House of Commons debate on Kashmir suggests that the people of Kashmir should be 'given the right to decide their own future through self-determination'¹¹³ in accordance with the UN SCRs on Kashmir. Nuttall MP also

109 HLD (9 March 2004) c1117.

110 AFP, 'UK's Boris Johnson calls for end to Kashmir violence in Pakistan visit' *The Times of India* (Mumbai, 24 November 2016) <<http://timesofindia.indiatimes.com/world/uk/UKs-Boris-Johnson-calls-for-end-to-Kashmir-violence-in-Pakistan-visit/articleshow/55605882.cms>> accessed 12 February 2017.

111 All-Party Parliamentary Kashmir Group, the UK Parliament <<http://www.publications.parliament.uk/pa/cm/cmallparty/160831/kashmir.htm>> accessed 31 January 2017. The aim of this group is 'to support the right of self-determination of the Kashmiri people through dialogue; to seek support from British parliamentarians; to highlight the abuses of human rights in Kashmir; and to seek justice for the people'. Kashmir All Party Parliamentary Group <<https://davidnuttall.info/2016/07/24/kashmir-all-party-parliamentary-group/>> accessed 31 January 2017.

112 Kashmir, *House of Commons Hansard* (19 January 2017) vol 619. <<https://hansard.parliament.uk/Commons/2017-01-19/debates/5E3E7217-2415-4B94-8748-3D9E6B1E759B/Kashmir>> accessed 1 February 2017.

113 Vidya Ram, 'Give Kashmiris right to decide their future' *The Hindu* (Chennai, 20 January 2017) <<http://www.thehindu.com/news/international/%E2%80%99Give-Kashmiris-right-to-decide-their-future%E2%80%99/article17063955.ece>> accessed 31 January 2017.

called on the UK government to encourage a United Nations intervention on the matter of 'the escalation in violence, use of pellet guns by armed forces against civilians, and breaches of international human rights on the Indian side of the line of control in Kashmir'.¹¹⁴

China

Kashmir is close to Xinjiang and Tibet and it therefore presents a security issue for China in terms of its western frontier. Before 1962, the Chinese government supported the UN SCRs on Kashmir, despite the fact that Pakistan was a western ally. From 1962 to 1975, due to Sino-Indian hostility, China's relations with Pakistan further improved.

China has condemned Indian policy regarding the Kashmir conflict and emphasised that the future of Kashmir should be decided by a referendum. Even during the 1971 Indo-Pakistani War, China requested Indian withdrawal from all the Pakistani territories, including Kashmir.¹¹⁵ Since mid-1990s, the Chinese position has been to support both bilateral negotiations and the implementation of the United Nations SCRs.¹¹⁶

India and China have long struggled with their pending border disputes¹¹⁷ and that has also shaped the Chinese position on the Kashmir issue. The Sino-Indian Boundary Dispute (SIBD) involves roughly 125,000 sq km of land¹¹⁸ and is divided into the three areas, namely: the Western (Karakoram tract, Aksai Chin, 33,500 sq km),¹¹⁹ Middle (Spiti area etc 2000 sq km),¹²⁰ and Eastern (Arunachal Pradesh, McMahon Line¹²¹ and *Tawang* area,

¹¹⁴ *ibid.*

¹¹⁵ Lü Zhaoyi 呂昭義 and Sun Jianbo 孫建波, *Zhong Yin Bianjie Wenti, Yin Ba Lingtu Jiufen Yanjiu* 中印邊界問題、印巴領土糾紛研究 (Beijing: People's Publishing House, 2013) 366–68.

¹¹⁶ *ibid* 377.

¹¹⁷ Junwa Pan, *Toward a New Framework for Peaceful Settlement of China's Territorial and Boundary Disputes* (Martinus Nijhoff Publishers 2009) 191.

¹¹⁸ Mamta Badkar, 'Here's Why China And India Are Trying To End A Long-Held Dispute Over A Barren Strip Of Land' (*Business Insider*, 29 October 2013) <<http://www.businessinsider.com/china-india-border-dispute-2013-10>> accessed 4 March 2017.

¹¹⁹ BN Tzou, *China and International Law: The Boundary Dispute* (Praeger 1990) 60.

¹²⁰ Xuecheng Liu, *The Sino-Indian Border Dispute and Sino-Indian Relations* (University Press of America 1994) 1–2; Hongzhou Zhang and Mingjiang Li, 'Sino-Indian Border Disputes' (ISPI Analysis no 181, June 2013) <http://www.ispionline.it/sites/default/files/publicazioni/analysis_181_2013.pdf> accessed 4 March 2017 at 2.

¹²¹ DP Choudhury, 'The North-East Frontier of India' (1970) 4 *Modern Asian Studies* 359, 360.

90,000 sq km)¹²² sectors. Historically, the Sino-Indian borders have never been formally delimited and customary lines are observed by both sides, though the Chinese government has secured its Western boundary and uses both military and diplomatic strategies in order to maintain its traditional custody of that boundary.¹²³

Overall, these disputes have directly affected the Sino-Indian relationship as well as Chinese policy on the Kashmir issue. The dispute over the Western sector involves Aksai Chin (part of the Princely State of Kashmir), from the Karakoram Pass to *Changchenmo* valley,¹²⁴ located in the Northwest of Tibet. In the Western sector, nearly, two-thirds of the boundary of Jammu and Kashmir with Xinjiang and Tibet lies in the Ladakh district, which is not under the Indian control.¹²⁵ China formally occupied Aksai Chin, which was a part of the historical territory of the Princely State of Kashmir, during the Sino-India war of 1962 and now administers it as the *Hotna* Prefecture in the Xinjiang Autonomous Region.¹²⁶ India claims it as a part of Indian Kashmir (Ladakh District), which India has occupied since the 1947 war with Pakistan. India also claims this territory based on the 1947 Instrument of Accession signed with Kashmir.

For China, Aksai Chin has been a part of its historical territory from the Qing period (1644–1912). China holds that during the Qianlong (1736–1795) era, the Sino-Indian western frontier served as the transportation and trading route connecting Xinjiang, Tibet, and British India. This route was used by the mission from Ladakh (part of Indian Occupied Kashmir) who entered southern Xinjiang. China argues that the Ladakh region was part of the Tibetan Empire and was later conquered by the Mughal Empire in 1664. After the unification of Xinjiang by the Qing, Ladakh surrendered to the Qing and continued to send tributes regularly. Until 1586, Ladakh was an independent nation with religious and commercial ties with Tibet. In 1684, after three years of war between Tibet and Ladakh, a peace treaty was signed between them. This treaty confirmed

122 John F Avedon, *In Exile from the Land of Snows* (Alfred A Knopf 1984) 28.

123 Gong Xingxing 龔星星, 'Dissertation about China Administrated Aksai Chin in Modern Times', 近代以來中國經營阿克賽欽研究 (Master thesis, Xinjiang University 2013) abstract.

124 Byron N Tzou, *China and International Law: The Boundary Dispute* (Praeger 1990) 60.

125 Pritam T Merani, 'The India-China Border Dispute' (1964) 13 *Journal of Public Law*. 167.

126 Nick Easen, 'Aksai Chin: China's disputed slice of Kashmir' (*CNN* 24 May 2002) <<http://edition.cnn.com/2002/WORLD/asiapcf/east/05/24/aksai.chin/>> accessed 5 December 2016.

the traditional Ladakh-Tibet boundary.¹²⁷ However, the 1842 treaty, which was signed by Tibet and Kashmir as well as by China, confirmed that Ladakh was still controlled by the government of Kashmir.¹²⁸ In terms of *de facto* control, Dogra Maharaja Gulab Singh (1792–1857) conquered Ladakh in 1834,¹²⁹ although China believes that Gulab Singh occupied Ladakh in a period when the Qing dynasty was declining.¹³⁰

In 1846, the territory of Kashmir came under British control after Maharaja Gulab Singh assisted them in defeating Maharaja Ranjit Singh of Punjab, who lost the second Sikh War against the British. He was unable to pay the war indemnity and as such was forced to forfeit the territory of Kashmir to the British. The British government in turn sold Kashmir to the Gulab Singh for approximately £100,000 under the 1846 Treaty of Amritsar (TOA).¹³¹ Since Britain wanted to prevent Gulab Singh from invading China again, which would have hurt British efforts to monopolise the trade of Tibetan wool and otherwise ensure British economic interests, the TOA also stated that the border line could not be changed.¹³² Meanwhile, the British also sought to draw up the Sino-Indian western border with China, but the Qing government declined the request. To China the Johnson-Ardagh Line, which included Aksai Chin and was drawn during British Indian rule, was imposed by the British on their own accord and hence was nothing more than their unilateral creation. As such, China does not recognise it. As late as 1959, Indian Prime Minister Nehru himself admitted that Aksai Chin has never been delimited.¹³³ However, he insisted that, '[B]eyond doubt, the whole of Aksai Chin area lays in Indian territory'.¹³⁴

127 Merani, (n 125) 167–68; Pan, (n 117) 200.

128 Merani, (n 125) 168.

129 See Chapter 2 of this book; also see Alastair Lamb, *Kashmir – A Disputed Legacy 1846–1990* (OUP 1991) 7–8.

130 Gong, (n 123).

131 Treaty of Amritsar (16 March 1846) art 3.

132 Gong, (n 123).

133 *Prime Minister on Sino-Indian Relations* (Government of India 1961) vol 1, 148–49; Xuecheng Liu, *The Sino-Indian Border Dispute and Sino-Indian Relations* (University Press of America 1994) 65; 'A Notice from the Ministry of Foreign Affairs of the People's Republic of China to the Embassy of India in China (26 December 1959)', Zhong Yin Bianjie Wenti 中印邊界問題 (2nd edn, People's Publishing House 1962) 31–33.

134 Liu, (n 133) 67.

Historically, since the Soviet Union was expanding into Xinjiang, Britain wanted Aksai Chin to be a part of Tibet in order to abate Russia's influence and ensure the security of British India. However, when they came to govern Kashmir, Aksai Chin was included into the territory of Kashmir. While China has shown willingness to discuss the demarcation with India in the Western sector, it has never accepted the Johnson-Ardagh Line as valid.¹³⁵ China treats Aksai Chin as its territory and values the connection it provides between Xinjiang and Tibet. Further, abandoning Aksai Chin would also provide Indian troops the opportunity to occupy the Tibetan Plateau.

From the Chinese perspective, India has created its nationalism by merely inheriting British colonial policies and infringing on the legitimate interests of other states, including China. China argues that the borders on British maps continually changed to match British aggression against Xinjiang and Tibet. Therefore, they reject the Indian claims relating to the Western sector border. China posits that it has historically governed this region and continues to do so, and hence has better title.¹³⁶ Further, China argues that India does not understand the history of this region and that they've adopted a policy of occupying Chinese territories.¹³⁷

Presently, the Trans-Karakoram Tract is also a part of the XAR, *Kargilik* County in *Kashgar* Prefecture. It is also claimed by India as part of Kashmir. Under the Sino-Pakistan Frontier Agreement 1963, Pakistan ceded this unpopulated territory to China. Article VI of the 1963 Agreement affirms that after the settlement of the Kashmir dispute, the sovereign authority in Kashmir would reopen negotiations with China on this boundary.¹³⁸ Unlike India, the Constitution of the People's Republic of China does not include any part of Kashmir in its territory.¹³⁹ Overall, for China, the Western sector border dispute over Aksai Chin is settled and considered as a 'closed chapter',¹⁴⁰ but India disagrees.

135 Gong, (n 123).

136 'A Notice from the Ministry of Foreign Affairs of the People's Republic of China to the Embassy of India in China (26 December 1959)' *Zhong Yin Bianjie Wenti* 中印邊界問題 (2nd edn, People's Publishing House 1962) 37–40.

137 Gong, (n 123).

138 Moham Ram, *Politics of Sino-Indian Confrontation* (Vikas Publishing House Pvt Ltd 1973) 4.

139 People's Republic of China 1982, adopted at the Fifth Session of the Fifth National People's Congress and Promulgated for Implementation by the Proclamation of the National People's Congress on 4 December 1982.

140 Ananth Krishnan, 'Month after border talks, Chinese paper says Aksai Chin is a closed chapter' *The Hindu* (Chennai, 16 February 2012).

The Eastern sector dispute in the far Northeast of India, bordering Bhutan and Burma, includes Arunachal Pradesh, the McMahon Line, and the *Tawang* area.¹⁴¹ India claims it as the Indian state of Arunachal Pradesh.¹⁴² The dispute is a result of a colonial treaty, the Simla Agreement of 1914.¹⁴³ China strongly rejects this treaty, which treats Tibet as an independent state.¹⁴⁴ Chinese officials claim the entirety of Arunachal Pradesh and call it 'Southern Tibet'.¹⁴⁵ The *Tawang* area is one of the 16 administrative districts of Arunachal Pradesh and is also claimed by China as a part of Tibet. The markings on the McMahon Line in the *Tawang* Area remain controversial.¹⁴⁶

Since 1959, the Eastern sector dispute has been complicated as India has provided refuge to the Dalai Lama and allowed him to set up his government in exile.¹⁴⁷ It was the confrontation over the Eastern sector that led to the war between China and India in 1962.¹⁴⁸ The war eventually led to India losing Aksai Chin, which is now administrated through Xinjiang¹⁴⁹ in China after a unilateral ceasefire.¹⁵⁰

From the Indian perspective, the traditional boundaries for the SIBD areas were confirmed by the Sino-India Agreement on Tibet signed on 29 April 1954.¹⁵¹ India claims to have established its control and administration over these areas, which were recognised by historical agreements between India

141 See generally, Anthony Carty and Fozia Nazir Lone, 'Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes' (2011) 19 Asia Pacific Law Review 93.

142 Alastair Lamb, *The China-India Border: The Origins of the Disputed Boundaries* (OUP 1964) 9.

143 Avedon, (n 122) 28.

144 371/164932, The National Archives of London.

145 Barry Sautman, 'Tibet's Putative Statehood and International Law' (2010) 9 Chinese Journal of International Law 127, 138; Dan Twining, 'Could China and India Go to War over Tibet?' (*Foreign Policy* (Washington, 10 March 2009).

146 Dorothy Woodman, *Himalayan Frontiers: A Political Review of British, Chinese, Indian and Russian Rivalries* (Praeger 1969).

147 See, Michael van Walt van Praag, *The Legal Status Of Tibet: Three Studies By Leading Jurists* (Office of Information & International Relations, Dharamsala, India 1989) vi-x.

148 Liu, (n 133) 2; D Palit, *War in High Himalaya: The Indian Army in Crisis, 1962* (Hurst & Company 1991) 23.

149 Nick Easen, 'Aksai Chin: China's disputed slice of Kashmir' (*CNN* 24 May 2002) <<http://edition.cnn.com/2002/WORLD/asiapcf/east/05/24/aksai.chin/>> accessed 5 December 2016.

150 Ram, (n 138) 2.

151 Merani, (n 125) 173.

and Tibet¹⁵² and later sealed by colonial inheritance. India, regarding the Middle sector, states that China's lack of previous objections to the 1954 accord is considered evidence of estoppel and that such agreements, from the Indian perspective, would not be subject to *rebus sic stantibus* (change of conditions), and also that the Chinese government's argument of not being bound by agreements signed by a previous, weaker government is not valid under international law.¹⁵³

Over the past decades, there have been periods of negotiated peace and periods of conflict between India and China on this issue. In January 1960, China was willing to compromise,¹⁵⁴ though Zhou Enlai was suspicious of the Indian stance and believed that India wanted Tibet as a protectorate in the role of a 'buffer state'. These fears appeared to be validated in 1962, when India's forward policy challenged China's territorial claims over Tibet,¹⁵⁵ leading to war between China and India. It took until around 1976 for the diplomatic relations between China and India to start to normalise. In the 1980s, rounds of talks took place to resolve the SIBD based on 'mutual understanding and mutual accommodation'. These negotiations failed as India insisted that minor territorial adjustments had to be made in the Eastern sector and that China had to unilaterally withdraw from the Western sector.¹⁵⁶

After the Cold War, China's influence increased in Southeast Asia. Since the 1990s, India has recognised ASEAN's importance and has launched its 'Look East' policy and actively engaged in Southeast Asian affairs.¹⁵⁷ Both China and India re-established their relations based on the five principles of peaceful co-existence, under which India accepted Chinese sovereignty over Tibet. On 7 September 1993, India and China signed the 'Agreement on Maintaining Peace and Tranquillity in the Border Areas along the Line of Actual Control'.

In 2003, a significant and rational shift took place regarding the SIBD. This came about through the steady and incremental process of setting up mechanisms to manage the disputes. Special Representatives were appointed on both

¹⁵² *ibid* 173–75, 177–78.

¹⁵³ Surya P Sharma, 'The India-China Border Dispute: An Indian Perspective' (1965) 59 *American Journal of International Law* 16, 19, 27, 41, 44–45.

¹⁵⁴ M Taylor Fravel, 'Regime Insecurity and International Cooperation: Explaining China's Compromises in Territorial Disputes' (2005) 30(2) *International Security* 46, 67.

¹⁵⁵ *ibid* 71.

¹⁵⁶ Liu, (n 133) 2–3.

¹⁵⁷ Zhao Hong, 'India and China: Rivals or Partners in Southeast Asia?' (2007) 29 *Contemporary Southeast Asia* 121.

sides and mandated 'to explore, from the political perspective... the overall bilateral relationship', and 'the framework of a boundary settlement'. This shift was formalised in 2005 by the signing of an agreement on the 'Political Parameters and Guiding Principles for the Settlement of the India-China Boundary Question'.

In recent times, both Beijing and New Delhi are engaged in developing infrastructure close to the Sino-Indian borders. Chinese infrastructure is complete up to the McMahon Line (in the Eastern sector) and the Indian side is to be completed by 2018.¹⁵⁸ China also has plans to enhance global connectivity and 'stimulate trade'¹⁵⁹ through reviving the land and maritime Silk Road. 'One Belt and One Road' involves a \$46 billion flagship project for the China-Pakistan Economic Corridor (CPEC) running partly through disputed territory in Kashmir (Karakoram Highway and Pakistan-occupied Kashmir, also part of Eastern sector of the SIBD) and connecting China to the port of Gwadar on the Arabian Sea.¹⁶⁰

However, the new international and regional geostrategic alignments that both countries are manoeuvring towards are not conducive to the peace required to enjoy the economic benefits of such developments. India is aligning with the US, Russia, and Japan, and has even interfered in the South China Sea dispute, causing China to reaffirm its close ties to Pakistan. Chinese Premier, Li Keqiang, reportedly stated, 'We support Pakistan, and we will speak for Pakistan in every forum. We attach great importance to Pakistan's position on Kashmir'.¹⁶¹ India fears that China, by gaining access to Gwadar via CPEC, will set up a military base there and gain a strategic advantage over India.¹⁶²

China regularly patrols its borders and has completed infrastructure projects involving Tibet, including railroads from Qinghai to Tibet and from Chengdu to Lhasa. China has also built military air bases in Tibet close to the

158 Pranav Kulkarni, 'Will finish building China border infrastructure by 2018: Rao Inderjit' *Indian Express* (Noida, 18 May 2015).

159 Claude Arpi, 'Demchok and the New Silk Road: China's double standard' (*Indian Defence Review*, 4 April 2016).

160 Faseeh Mangi, 'China's New Silk Road Hinges on a Small Pakistan Port' (*Bloomberg*, 30 September 2016).

161 Panos Mourdoukoutas, 'Will India Spoil China's South China Sea Ambitions?' (*Forbes*, 9 November 2016) <<http://www.forbes.com/sites/panosmourdoukoutas/2016/11/09/will-india-spoil-chinas-south-china-sea-ambitions/#6b7846c75992>> accessed 17 February 2017.

162 Major General SG Vombatkere, 'Balochistan and the India-China Face Off' (*The Citizen* 31 August 2016).

Indian border and highways that provide access to the disputed Eastern sector, and has opened a railroad along the Karakoram Highway through Pakistan-administered Kashmir linking *Kashgar*, Xinjiang with Islamabad. In view of these developments, experts in India believe that China is preparing for a second Sino-Indian border war.¹⁶³ India, in retaliation, has deployed elite mountain divisions towards both the Eastern and Western sectors and has built airstrips in key areas like *Tawang* and Ladakh. In 2016, border clashes have caused deaths of soldiers from both China and India. These strategic relationships affect international as well as regional power distribution¹⁶⁴ and have a direct bearing on the resolution of Kashmir dispute.

China seems more interested in pursuing its development plans with Pakistan and supports Pakistan's position on the Kashmir dispute, which became evident in the ongoing unrest in Kashmir since June 2016.¹⁶⁵ In the presence of these disagreements, the likelihood of war remains high since the 'intractable' territorial differences 'tend to give rise to the foreign policy practices of power politics'.¹⁶⁶ China also controls some parts of northern Kashmir, which Pakistan ceded to China through the Sino-Pakistan Frontier Agreement 1963. Article VI of the Agreement affirms that after the settlement of the Kashmir dispute, the sovereign authority in Kashmir would reopen negotiations with China on the boundary.¹⁶⁷

The Chinese legal position on Kashmir became clear in February of 1972, when they proclaimed that India and Pakistan should 'withdraw all their forces' to their respective territories and expressed its firm support for 'the people of Jammu and Kashmir in their struggle for the self-determination'.¹⁶⁸ The Sino-Pakistani Agreement of 1963 suggests that China had accepted that their part of Kashmir (Aksai Chin) was subject to this same right. China's position in Tibet has not influenced their policy on Kashmir, notwithstanding India's

¹⁶³ *ibid.*

¹⁶⁴ Waheguru Pal Singh Sidhu and Jing-dong Yuan, *China and India – Cooperation or Conflict?* (Lynne Rienner Publishers 2003) 79.

¹⁶⁵ Tom Hussain, 'How India-Pakistan Tensions (and US-China Rivalry) are Raising Nuclear Stakes', *SCMP* (Hong Kong, 8 October 2016).

¹⁶⁶ Eric Hyer, *The Pragmatic Dragon-China's Grand Strategy and Boundary Settlements* (UBC Press 2015) 3.

¹⁶⁷ Ram, (n 138) 4.

¹⁶⁸ Joint Statement Following Discussions with Leaders of the People's Republic of China, Shanghai, 27 February 27 1972, in *FRUS*, 1969–76, Richard M. Nixon/ Gerald R. Ford, vol XVII, China 1969–1972 (2006) 814.

stance to provide sanctuary to the anti-Chinese, secessionist government-in-exile led by the Dalai Lama.¹⁶⁹

In recent times, India has been suspicious of the relationship between China and Pakistan, previously due to China sharing nuclear weapons technology with Pakistan,¹⁷⁰ and currently due to CPEC, which runs through Pakistan-Occupied Kashmir. India sees Pakistan as benefiting from the Chinese veto and some Indian reports claim that members of the Chinese military have been seen at the Line of Control.¹⁷¹ During the 2016 unrest in Kashmir, Chinese flags were waved at some protests.¹⁷² India's Prime Minister, Narendra Modi, while celebrating his country's 69th anniversary of independence, was seen to have been deliberately provocative when he brought up Baloch affairs in Pakistan and openly stated that he supports Baloch separatism.¹⁷³ India's willingness to support Baloch secessionist movement has been seen as part of the RSS/BJP hyper-nationalist goal of stopping CPEC.¹⁷⁴ It is believed such support will damage the viability of the China and Pakistan project as Baloch rebels have been disruptive to CPEC.¹⁷⁵

The Chinese position has been that the CPEC project is part of China and Pakistan's friendly cooperation and is not connected to India-Pakistan disputes.¹⁷⁶ Andrew Korybko, a political analyst and journalist, has warned that India's aggressive support for Baloch separatism in Pakistan could lead to problems in the Iranian province of Sistan, which is next door to Baluchistan.

169 Suisheng Zhao, 'The Making of China's Periphery Policy' in Suisheng Zhao (ed), *Chinese Foreign Policy: Pragmatism and Strategic Behaviour* (M.E. Sharpe 2004) 256, 268.

170 David Malone, *Does the Elephant Dance?: Contemporary Indian Foreign Policy* (OUP 2011) 62.

171 Prakash Katoch, 'Indian intel may shrug off China's presence in Kashmir, but it may be worse than we think' (FirstPost 26 November 2016) <<http://www.firstpost.com/world/indian-intel-may-shrug-off-chinas-presence-in-kashmir-but-it-may-be-worse-than-we-think-3125720.html>> accessed 14 December 2016.

172 Abid Bashir and Khalid Gul, 'Govt foils 'Raj Bahwan Chalo' with curbs', *Greater Kashmir* (Srinagar, 15 October 2016) 1.

173 Andrew Korybko, 'India's Geopolitical Hate For Pakistan Is Sabotaging The North-South Corridor' (*Katehon* 30 August 2016) <<http://katehon.com/article/indias-geopolitical-hate-pakistan-sabotaging-north-south-corridor>> accessed 2 February 2017.

174 *ibid.*

175 Mangi, (n 160).

176 Ministry of Foreign Affairs of the People's Republic of China, 'Foreign Ministry Spokesperson Hong Lei's Regular Press Conference on April 20, 2015' <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1256093.shtml> accessed 31 December 2016.

Sistan province hosts the Indian-financed port of Chabahar, which forms the irreplaceable terminal for the North-South Corridor. An enflamed conflict in Balochistan could also present a threat for Iran and Russia as both countries depend on stability in and around Chabahar. Such stability would ensure the long-term strategic viability of the ambitious transcontinental corridor that will connect South Asia with Western Europe by means of their transit territory.¹⁷⁷ Political analysts also believe that there is a very real possibility that the US will control any future conflict in that area. Clearly, targeting Sistan and Balochistan province with co-opted fighters from the separatist war in Pakistan will suit the US as it will be a blow against both Moscow and Tehran's strategic long-term economic interests in Chabahar. Even though this would affect Indian interests, the US has not been known to find negative impacts on its allies dissuasive, and India is by no means an exception to this long-established rule.¹⁷⁸

China's policy is not to get involved in the domestic disputes of other states. Overall, China remains a friendly neighbour of India and Pakistan, and welcomes cooperation in settling their dispute over Kashmir through negotiations and consultations.¹⁷⁹ While recognising the Kashmir dispute between Pakistan and India, China does not see itself as a part of it.¹⁸⁰ However, China's attitude to the Kashmir issue has changed since the 1950s, when it supported India and Pakistan resolving the Kashmir issue without any external interference.¹⁸¹ After the 1962 war between China and India and through to the late 1980s, China emphasised that the Kashmir issue should be settled with full respect to the right to self-determination of the Kashmiri people. Given the context, this position could be regarded as supporting Pakistan's assertion over the sovereignty of Kashmir.

From the mid-1990s, Beijing again emphasised that India and Pakistan should resolve the dispute by bilateral negotiation. Since the late 1990s, China

¹⁷⁷ Korybko, (n 173).

¹⁷⁸ *ibid.*

¹⁷⁹ Foreign Ministry Spokesman Kong Quan's Press Conference on 31 May 2005 (Ministry of Foreign Affairs of the People's Republic of China) <<http://www.china-embassy.org/eng/fyrth/t198223.htm>> accessed 2 November 2007; Foreign Ministry Spokesman Liu Jianchao's Press Conference on 6 April 2006 <<http://www.china-embassy.org/eng/fyrth/t244864.htm>> accessed 2 November 2007.

¹⁸⁰ Ministry of Foreign Affairs of the People's Republic of China, (n 176).

¹⁸¹ Ministry of Foreign Affairs of the People's Republic of China (ed), *Xinzhongguo Waijiao Fengyun* 新中國外交風雲 vol 1 (World Affairs Press 1990) 59.

has called for a peaceful resolution to the Kashmir dispute and encouraged the parties to exercise restraint.¹⁸² However, as noted above, China's increasingly tense relations with India have pushed them to support Pakistan more firmly. In 2009, China started to issue separate/stapled hand-written visas on loose sheets of paper rather than stamped visas to the residents of Indian Occupied Kashmir,¹⁸³ which indicated that China did not recognise Indian sovereignty over Kashmir.¹⁸⁴ The Indian government condemned China's decision and rejected these visas as 'fake'.¹⁸⁵ As a result, many students and businessmen from Indian-administered Kashmir were not allowed to travel to China on such visas¹⁸⁶ and the issue led to a great deal of diplomatic turmoil. China has also issued such visas to the residents of Arunachal Pradesh, which it sees as a part of Tibet.¹⁸⁷ China has also refused visas to Indian military personnel who have served in Indian Occupied Kashmir.¹⁸⁸

Overall, it is important to note that the basic legal position of China has not changed on the Kashmir dispute: (1) it does not recognise the occupation of India or Pakistan over Kashmir, and (2) Aksai Chin, which is under Chinese control, is a matter for future negotiations with a sovereign that legitimately governs Kashmir.

182 Zhang Li 張力, 'China's Diplomatic Policy towards South Asia and Kashmir Issue' 中國的南亞外交與克什米爾問題 [2006] 1 South Asian Studies Quarterly 41.

183 Altaf Hussain, 'Row over China Kashmir visa move' (*BBC* 1 October 2009) <<http://news.bbc.co.uk/2/hi/8285106.stm>> accessed 1 February 2017.

184 Asgar Qadri, 'Story Behind a Stapled Chinese Visa' *The New York Times* (New York, 8 November 2013) <<https://mobile.nytimes.com/blogs/india/2013/11/08/story-behind-a-stapled-chinese-visa/?referer=>>> accessed 1 February 2017.

185 Smriti Kak Ramachandran, 'Stapled visa issue with China still unresolved' *The Hindu* (Chennai, 1 June 2015) <<http://www.thehindu.com/news/national/stapled-visa-issue-with-china-still-unresolved/article7268941.ece>> accessed 1 February 2017. In 2012, during the UPA government's tenure, China agreed to stop stapling visas of Jammu and Kashmir residents.

186 Hussain, (n 183).

187 Charu Sudan Kasturi, 'Tit-for-tat stapled visa signal to Beijing' *The Telegraph* (Calcutta, 4 June 2015) <https://www.telegraphindia.com/1150604/jsp/nation/story_23835.jsp#.WJK1u7XyzIV> accessed 1 February 2017.

188 Banyan, 'China and Kashmir – The Chinese connection' *The Economist* (London, 29 August 2010) <http://www.economist.com/blogs/banyan/2010/08/china_and_kashmir> accessed 2 February 2017. Indian general, B S Jaswal, who headed the army's Northern Command was refused a visa, apparently because of his work in Kashmir.

Russia

During the Cold War era, Russia and India became allies because Pakistan established closer relations with the West by joining the US-sponsored South East Asian Trade Organization (SEATO) in 1954.¹⁸⁹ The vital national interests of the USSR and a rivalry with the West prompted Moscow to bail New Delhi out of tricky situations by vetoing two major draft UN SCRs¹⁹⁰ on Kashmir, dated 20 February 1957¹⁹¹ and 22 June 1962,¹⁹² respectively. These resolutions urged the governments of India and Pakistan to enter into direct negotiations on the Kashmir question with the view to ultimately settle it in accordance with previous SCRs and the relevant provisions of the UNC, including Article 33.

As archival documents suggest, during the Cold War era the USSR remained engaged in the blame game, accusing imperialist powers of inciting the armed tribal attack on Kashmir in 1947. The official state newspaper, *Pravda*, published an article with the headline 'Who Needs an Aggravation of the Kashmir Question?' on 10 March 1957.¹⁹³ The Soviet Union also accused the US of trying to strengthen its position in Kashmir by inciting an anti-Indian revolution and sending international forces to Kashmir¹⁹⁴ to achieve demilitarisation and a plebiscite.¹⁹⁵

However, there were periods when Soviet policy was less staunch on the position that Kashmir was an integral part of India, particularly in the mid-1960s. During the visit of Soviet President Mikoyan and Vice-Premier Kirill Mazurov

189 Ather Naqvi, 'World's view on Kashmir' *The News on Sunday* (Lahore, 28 August 2016) <<http://tns.thenews.com.pk/worlds-view-kashmir/#.WJNJ-rXyzIV>> accessed 2 February 2017.

190 Rakesh Krishnan Simha, 'Veto No.100: How Russia blocked the West on Kashmir' *RBTH Network* (Moscow, 1 November 2016) <http://in.rbth.com/blogs/stranger_than_fiction/2016/11/01/veto-no100-how-russia-blocked-the-west-on-kashmir_644137> accessed 2 February 2017.

191 Misra, (n 43) 400.

192 The India-Pakistan Question – Ireland: draft resolution, UNSC (22 June 1962) UN Doc S/5134.

193 See, FO 371/129772: DY1041/196: Outward Saving Telegram Pravda has accused Britain and the United States of causing tension in Indo-Pakistan relations. 11 March 1957 [NAL].

194 *ibid*.

195 FO 371/129777: DY1041/305: Points from Foreign Secretary's Press Conference on 20 July 1957 [NAL].

to India in June 1964,¹⁹⁶ they offered to mediate between India and Pakistan. This culminated in the Tashkent Agreement in 1965. The Soviet representatives worked hard in Tashkent behind the scenes, but unfortunately the Indian PM, Shastri, died soon after his arrival back home and the agreement died with him. In 1965, the USSR also abstained from blocking SCR 209¹⁹⁷ on Kashmir¹⁹⁸ and adopted a neutral position on the border dispute about 'Rann of Kutch'¹⁹⁹ between India and Pakistan.²⁰⁰ Later, Soviet Prime Minister Alexi Kosygin mediated to end the 1966 Indo-Pak war.²⁰¹

However, the overall positions of India and the USSR on the most important international issues were similar or the same.²⁰² The USSR supported India on Goa and its role in the creation of Bangladesh in 1971. For its part, India remained supportive of Soviet policies throughout the Cold War era, especially of the Soviet invasion of Afghanistan in 1979. However, the Indo-Soviet relationship suffered a setback in the late 1980s when India attempted to improve relations with the US and adopted a different stance on the Afghan issue.²⁰³ After the collapse of the Soviet Union, Russia is now taking a more balanced approach toward the region. Since India is diplomatically closer to the US, Russia has begun collaborating with Pakistan. Moscow and Islamabad conducted their first military exercises amidst the 2016 Indo-Pakistan/Kashmir unrest

196 *The Link* (New Delhi 29 August 1965), 9.

197 UNSCR 209 (4 September 1965).

198 Sheldon W Simon, 'The Kashmir Dispute in Sino-Soviet Perspective' (1967) 7 *Asian Survey* 176, 177.

199 The 'Rann of Kutch' is a seasonally marshy region located in the *Thar* Desert biogeographic province of Gujarat State in Northwestern India and Sind province in Pakistan. The main dispute is over the Sir Creek (named after a British representative who was requested to mediate in a dispute), a strip of water that opens into the Arabian Sea, and divides the Kutch region of the Indian State of Gujarat and Sindh province in Pakistan. This region is also rich in salt and natural gas, and is also a resting site for migratory Siberian birds. It is believed that this dispute was salient to the wars of 1965 and 1999 between India and Pakistan. See, generally, Mukund G Untawale, 'The Kutch-Sind Dispute: A Case Study in International Arbitration' (1974) 23 *The International and Comparative Law Quarterly* 818.

200 SP Seth, 'Russia's Role in Indo-Pak Politics' (1969) 9 *Asian Survey* 614, 616.

201 Dmitri Trenin, 'Russia, China Can Help Kashmir Tensions' *Global Times* (Beijing, 10 October 2016) <<http://www.globaltimes.cn/content/1010455.shtml>> accessed 4 March 2017.

202 The Embassy of the Russian Federation in the Republic of India.

203 Debidatta Aurobinda Mahapatra, 'Russia's Policy Towards the Kashmir Issue in the Changing World Order' (2004) 41 *International Studies* 129, 132.

despite India's resistance.²⁰⁴ Moscow is clearly steering away from the Cold War-era geopolitical set-up, in which the Moscow-Delhi axis opposed the Beijing-Islamabad one.²⁰⁵ Russia's approach has also affected its Kashmir policy to be more neutral as against pro-Indian. Overall, the foreign policy of successive Russian governments under Yeltsin and then Putin have encouraged 'bilateral dialogue' between India and Pakistan.²⁰⁶

The international community has clearly shown that demilitarisation and a plebiscite are entrenched in the international legal position on Kashmir. However, the USSR was opposed to the use of UN force to support demilitarisation in Kashmir. This policy encouraged the incorporation process that India undertook in occupied Kashmir. It is important to recall that the USSR had accepted that the right to self-determination was a legitimate means to determine the will of the people, as is reflected in the Leninist ideology during the Bolshevik Revolution. Indeed, they accepted that secession and conducting plebiscites (or referendums) were legitimate means for realising self-determination.²⁰⁷

The Soviet legal position on secession became clearer in 1971 when it strongly supported India in East Pakistan.²⁰⁸ The acceptance of secession as a method of exercising self-determination was also expressed in their Constitution in Article 72 in the following words: 'Each Union Republic shall retain the right freely to secede from the USSR'.²⁰⁹ The Soviet position supported the view that states that were illegally occupied were entitled to restore their historical title.

The Russian recognition of the Baltic republics as sovereign states also supports this view.²¹⁰ Furthermore, Russia continues to reject illegal occupation as a means of acquiring title to territory, notwithstanding their position on

204 News Desk, 'Russian forces arrive in Pakistan for first-ever joint military exercise' *The Express Tribune* (Karachi, 23 September 2016) <<https://tribune.com.pk/story/1186889/russian-forces-arrive-pakistan-first-ever-joint-military-exercise/>> accessed 2 February 2017.

205 Trenin, (n 201).

206 PTI, 'India, Pakistan should resolve issues through peaceful means: Russia' *Indian Express* (Noida, 18 December 2016) <<http://indianexpress.com/article/india/india-pakistan-should-resolve-issues-through-peaceful-means-russia-4432703/>> accessed 19 December 2016.

207 Antonio Cassese, *Self-Determination of Peoples-A Legal Reappraisal* (CUP 1995) 17.

208 Lee C Buchheit, *Secession: The Legitimacy of Self-Determination* (Yale University Press 1978) 208.

209 Constitution (Fundamental Law) of the Union of Soviet Socialist Republics 7 October 1977 <<http://www.departments.bucknell.edu/russian/const/77conso3.html#chapo8>> accessed 25 March 2008.

210 Lawrence S Eastwood Jr, 'Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia' (1993) 3 *Duke Journal of Comparative & International Law* 299, 320.

secession²¹¹ and stance on Chechnya²¹² and Kosovo.²¹³ It bears repeating that as the previous discussions in this study have demonstrated, the Kashmir situation is mainly akin to cases where there has been restoration of historical title. It is not a case of secession and therefore, in that context, is not comparable to Chechnya or Kosovo. Russia, as a continuation of the Soviet Union, has accepted the resolutions concerning the plebiscite in Kashmir, which also signifies that they have acknowledged that Kashmir is a disputed territory.

The Soviet policy of opposing certain SCRs on Kashmir was devoid of any legal justification within Soviet state practice. Rather the Soviet stance on Kashmir was guided by political alliance-building and did not affect their legal position. For example, in Transnistria (Moldova)²¹⁴ the Russian foreign policy was to support the secessionist movement to accomplish the political gains. Russia's official line was the same for the two Georgian states of Abkhazia and South Ossetia.²¹⁵ After fighting a brief war with Georgia in August 2008, Moscow recognised the independence of two Georgian enclaves that have long sought to secede from Georgia.²¹⁶ The Russian President, Dmitry Medvedev, recognised the independence of the Georgian enclaves with unexpected swiftness on 26 August 2008,²¹⁷ only a day after the Russian Parliament unanimously called upon him to do so.²¹⁸ The international community did not

211 Byelorussian SSR, article 40 CCPR Report, UN Doc. CCPR/C/1/Add.27 (1978) 5.

212 WC Papadopoulos, 'International Law & Pipeline Geopolitics in the Caspian Sea' (1999) 36 *Texas Journal of Business Law* 1, 18.

213 The Russian parliament passed a motion condemning the declaration of Kosovo's independence. See, Staff, 'Recognition for new Kosovo grows' (*BBC News* 24, 18 February 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7251359.stm#map>> accessed 18 February 2008.

214 Tarik Abdel-Monem, 'How Far Do The Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights' (2005) 14 *Journal of Transnational Law & Policy* 159, 183.

215 Matthew Collin, 'Georgia Clashes Reignite War fears' (*BBC News* 8 August 2008) <<http://news.bbc.co.uk/2/hi/europe/7547888.stm>> accessed 10 August 2008.

216 Clifford J Levy, 'Russia Backs Independence of Georgian Enclaves' *The New York Times* (New York, 27 August 2008) <<http://www.nytimes.com/2008/08/27/world/Europe/27rusia.html?pagewanted=print>> accessed 29 August 2008.

217 'Statement by President of Russia Dmitry Medvedev' (*President of Russia Official Web Portal* 26 August 2008) <http://www.kremlin.ru/eng/text/speeches/2008/08/26/1543_type82912_205752.shtml> accessed 29 August 2008.

218 Staff, 'Russian MPs Back Georgia's Rebels' (*BBC News* 25 August 2008) <<http://newsvote.bbc.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/europe/>> accessed 29 August 2008.

recognise this Russian action and indeed expressed concern that it might raise tension in the Caucasus, the Armenian enclave of Azerbaijan, and other secessionist movements in the world.²¹⁹ Both regions are now *de facto* separated from Georgia.²²⁰ The attempted intervention by the European Union in relation to South Ossetia and Abkhazia could be said to be attempting this by seeking territorial stability for the *de facto* state. The European Union reached an agreement with Georgia to not use violence, backed by the promise from the European Union to deploy a 200 strong observational force.²²¹ At the United Nations, Georgia has refused such 'territorial swaps'.²²²

It is argued the Russian decision to recognise independence of South Ossetia and Abkhazia was influenced by number of political motivations. Firstly, the tension between Russia and Georgia escalated over the latter's intension to join NATO, which the former saw as a security threat. This apprehension becomes clear from the 21 March 2008 resolution of the State *Duma* which supported independence of the Georgian enclaves should Georgia join NATO.²²³ Secondly, the decision was in part retaliation for the Western support for the independence of Kosovo from Serbia, which Russia had opposed.²²⁴ Thirdly, Georgian nationalism had caused tensions in South Ossetia over a prolonged period, leading to flow of refugees to North Ossetia and an armed conflict with Russia in 1992.²²⁵ Finally, Russia had the aim of controlling the flow of Caspian oil, which also gave them a *de facto* control over the long Black Sea coastline of Abkhazia.²²⁶ It is therefore clear that the Russian decision to recognise the independence of South Ossetia and Abkhazia is a political move rather than

219 Collin, (n 215).

220 Thomas W Simon, 'Remedial Secession: What the law should have done, from Katanga to Kosovo' (2011–2012) 40 Georgia Journal of International & Comparative Law 105, 141.

221 Marc Weller, 'Settling Self-determination Conflicts: Recent Developments' (2009) European Journal of International Law 20, 111, 148.

222 *ibid* 134.

223 Caucas Europenews 26 March 2008 <http://www.caucas.com/home_eng/depeches.php?idp=1911&PHPSESSID=e72e28f7a27e219ceod7ab0039cfeod5> accessed 1 September 2008.

224 Collin, (n 215).

225 Jeremy Smith, *Red Nations: The Nationalities Experience in and after the USSR* (CUP 2013) 342.

226 Papadopoulos, (n 212).

one based on any legal justification.²²⁷ The situation is furthermore generally seen as too unique to be considered a precedent.²²⁸

Similarly, criticisms about acting in political self-interest have been applied to Russian actions in the self-determination attempts of Crimea.²²⁹ The referendum results from March 2016, with 97% voting to secede from the Ukraine and join Russia, have been widely questioned.²³⁰

While Moscow's foreign policy on secession may depend on the facts of the dispute, this does not change their legal position on Kashmir. Kashmir is not a case of secession but rather one of restoration of historical title, as in the case of the Baltic States, which Russia now recognises. The Baltic States were occupied by the Soviet Union from 17 June 1940 through acts of aggression and in violation of international law.²³¹ The declarations of the end of Soviet control by the Baltic States in 1990 (Lithuania) and 1991 (Estonia and Latvia) were accepted as restorations of the pre-existing statehood of these countries.²³²

The European Union (EU)

The EU facilitates the political and economic union of its Member States.²³³ There is some controversy about the extent to which the constituent bodies of

227 Rein Mullerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8 Chinese Journal of International Law 2, 14.

228 *ibid.*

229 See generally, Khazar Shirmammadov, 'How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination: The Case of Crimea' (2016) 4(1) Russian Law Journal 61; Major Justin A Evison, 'MiGs and Monks in Crimea: Russia Flexes Cultural and Military Muscles, Revealing Dire Need for Balance of *Uti Possidetis* and Internationally Recognized Self-Determination' (2014) 220 Military Law Review 90, 105.

230 Brad Simpson, 'Self-Determination in the Age of Putin' *Foreign Policy* (Washington, 21 March 2014) <<http://foreignpolicy.com/2014/03/21/self-determination-in-the-age-of-putin/>> accessed 10 December 2016. Also see generally, Christopher J Borgen, 'Law, Rhetoric, Strategy: Russia and Self-Determination before and after Crimea' (2015) 91 International Law Studies 216, 228, 237–38, 256; Anton Bebler, 'Crimea and the Russian-Ukrainian Conflict' (2015) 15 Romanian Journal of European Affairs 35, 38–39, 42.

231 Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic states by the USSR: A Study of the Tension between Normativity and Power in International Law* (M. Nijhoff Publishers 2003) 46.

232 *ibid.* 47.

233 European Union <https://europa.eu/european-union/index_en> accessed 12 February 2017.

the EU should govern foreign policy and how much should be left to the individual decisions of Member States.²³⁴ The Treaty on European Union²³⁵ refers to the Common Foreign and Security Policy (CFSP) in wide terms to cover 'all areas of foreign and security policy'.²³⁶ The scope of the CFSP, which defines the EU approach, is very broad and includes taking a 'common position' on certain matters of a geographical or thematic nature.²³⁷ On particularly sensitive issues, where individual EU countries might have special interests, no common policy has to be formulated. For example, the EU External Relations Council in the context of Kosovo's declaration of independence noted that Member States would decide, in accordance with national practice and international law, on their relations with Kosovo.²³⁸

Keeping in view the contentious nature of the Kashmir question, the EU has not adopted any official 'common position' on the subject of Kashmir.²³⁹ Hence, there is no agreed approach to which Member States must conform.²⁴⁰ As the EU wishes to maintain good relations with both India and Pakistan, they have expressed full support for the peace process, encouraging both sides to agree on substantive confidence-building measures.²⁴¹

The European Parliament (EP) has a Committee on Foreign Affairs and it has produced two reports on Kashmir. These EP reports recognise the crisis in Kashmir as an issue with global implications and show a willingness to offer diplomatic assistance. The first ad hoc delegation of the EP was sent to Kashmir under the leadership of John Cushnahan.²⁴² In their report, the delegation affirmed that there are three parties to the Kashmir dispute: India, Pakistan, and the Kashmiri people. They called for all three to be fully involved

234 'Book Review- Cafruny, A. & Peters, P. (ed), 'The Union and the World: The Political Economy of a Common European Foreign Policy' (The Hague: Kluwer Law International, 1998)' (1998–1999) 5 Columbia Journal of European Law 167.

235 Treaty on European Union (or Maastricht Treaty) 1992 (92/C191/01).

236 Paul Craig and Gráinne de Búrca, *EU Law Text, Cases, and Materials* (4th edn, OUP 2008) 189.

237 *ibid.*

238 See Council of the European Union, Brussels, 18 February 2008 (6496/08 (Presse 41)) <https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/98818.pdf> 10 December 2017.

239 Email from Richard Wilkinson to the author (26 March 2008).

240 *ibid.*

241 *ibid.*

242 EP (2004), 'Summary Report – Recommendations': Visits of the ad hoc delegation of the European Parliament to Kashmir, 8–11 December 2003 and 20–24 June 2004. EP, Committee on Foreign Affairs. CR\537832EN.doc, PE 346.887.

in the dialogue.²⁴³ This pro-people approach is significant and has also been endorsed by the report prepared by Baroness Nicholson of Winterbourne, showing a real emphasis on the point that the Kashmir question can only be solved with the involvement of the peoples of all parts of the former Princely State.²⁴⁴

The EP elaborated on this during the German EU-Presidency in the first half of 2007.²⁴⁵ It was pointed out that the preconditions for the plebiscite, as stated in various UN SCRs, have not been met at present.²⁴⁶ The EP also insisted that there should be unrestricted access for human rights organisations to all parts of the former Princely State in order for them to be able to investigate violations and compile regular independent reports.²⁴⁷ In 1992, the EP passed a resolution condemning all terrorism, repression, and human rights abuses in Kashmir and affirmed that it 'may influence EC's relations with India and Pakistan'. They asked 'India and Pakistan to work towards a peaceful solution, taking account of the Kashmiri view on self-determination'.²⁴⁸

Today, that is the stance of all the EU Member States, particularly the states like Germany that have less focus at the national level on the relationship between India and Pakistan due to historical reasons.²⁴⁹ The foreign policy position of Germany is that it 'pursues no national objectives which could not be achieved by the policy of the EU towards the Kashmir dispute'.²⁵⁰ However, Germany also believes that together with its partners in the EU, it cannot abstain from efforts to help to solve a conflict that involves two nuclear powers.²⁵¹

Likewise, in 2001 the then-French Foreign Minister Hubert Vedrine urged India and Pakistan to hold talks to ease tensions over the disputed territory of Kashmir in a 'mature' manner through dialogue.²⁵² The striking components

243 'Summary Report Recommendations' CR\537832EN.doc; PE 346.887, 2004, Recommendation No 1.

244 EP Report, (2007) *Kashmir: present situation and future prospects*, 2005/2242(IN1), Adopted on 21 March 2007, para 1.

245 W Grundies, (pol-3@lond.auswaertiges-amt.de), 21 November 2007. *Kashmir Dispute* Email to F. Lone (f.lone@abdn.ac.uk).

246 EP Report, (n 244), para 11.

247 *ibid* para 26.

248 EP Parliament, Res. B3-0323/92 of 12 March 1992.

249 Email from W Grundies to the author (21 November 2007).

250 *ibid*.

251 *ibid*.

252 Staff, 'France urges calm over Kashmir', (*BBC News* 1 November 2001) <http://news.bbc.co.uk/1/hi/world/south_asia/1631658.stm> accessed 26 October 2007.

of the EU policy are their recognition of Kashmir as a dispute, and their desire to solve the Kashmir issue through talks in which the people of Kashmir should be included.

The Commonwealth Position

The Commonwealth considers Kashmir to be a disputed territory.²⁵³ While defining the geography of India and Pakistan, the Commonwealth declared that 'There is no intention to define the status of Jammu and/or Kashmir, which has not yet been agreed upon by the parties'.²⁵⁴

A former Australian Prime Minister, Mr Robert Menzies, suggested stationing Commonwealth forces in Kashmir or having a joint Indo-Pakistan force to help the Plebiscite Administrator. India, however, rejected the proposal. Australia also backed a resolution on Kashmir that proposed sending UN forces to assist in the international community's efforts to achieve demilitarisation by India and Pakistan.²⁵⁵ Today, Australia recognises the territory of Kashmir as being disputed²⁵⁶ and welcomes the pursuit of peace between India and Pakistan.²⁵⁷ The other Commonwealth countries, including Canada and New Zealand, have a similar position on Kashmir.

The Organisation of Islamic Cooperation (OIC)

The OIC²⁵⁸ consists of 57 Islamic Member States of the UN. The policy of the OIC on Kashmir is that all rights of the people of Jammu and Kashmir (J&K), including their right to self-determination as provided for by the UN SCRs, should be fully respected and honoured.²⁵⁹ The Indian military presence in

253 Staff, Pakistan Geography (*Commonwealth Secretariat*, undated) <<http://thecommonwealth.org/our-member-countries/pakistan>> accessed 10 December 2016.

254 Draft Commonwealth Secretariat –India Technical Cooperation Framework 2006/07–2007/08; Draft Commonwealth Secretariat– Pakistan Technical Cooperation Framework 2006/07–2007/08.

255 Misra, (n 43) 405.

256 Staff, 'Pakistan Country Brief' (Australian Government, Department of Foreign Affairs and Trade, November 2007). Also see, Staff, 'India Country Facts' (Australian Government, Department of Foreign Affairs and Trade, 2016) <<http://dfat.gov.au/geo/india/Pages/india-country-brief.aspx>> accessed 10 December 2016.

257 Statement of Australia's Foreign Minister Alexander Downer (1996–2007) quoted in Staff, 'Welcome for Kashmir breakthrough', (*BBC News* 7 January 2004) <http://news.bbc.co.uk/2/hi/south_asia/3374517.stm> accessed 29 August 2005.

258 Organisation of Islamic Cooperation <<http://www.oic-oci.org/home/?lan=en>> accessed 12 February 2017.

259 Staff, 'The 11th OIC Summit, Ministerial Session, Final Communiqué, 13–15 March 2008, Senegal (Dakar)' *The Hindu* (Chennai, 16 March 2008).

Kashmir is considered an occupation.²⁶⁰ The OIC also welcomes the 'dialogue process' started by Pakistan and India and expresses the hope that it will culminate in the resolution of the Kashmir dispute.²⁶¹ Concerned about human rights violations, the OIC called upon India to put an end to its repressive policies in J&K.²⁶²

The OIC agreed to provide all possible political and diplomatic support to the true representatives of the Kashmiri people in their struggle against foreign occupation²⁶³ and their overall freedom movement.²⁶⁴ A Contact Group on Kashmir was constituted to meet at least three times a year to coincide with the sessions of the UN General Assembly and the UN Commission on Human Rights, as well as the OIC Ministerial meetings.²⁶⁵ The Secretary General of the OIC, during the 2016 Kashmir unrest that resulted in gross and systematic human rights violations against the Kashmiri people and the use of excessive force against them in Indian Occupied Kashmir, expressed his solidarity and support to the people of Kashmir.²⁶⁶

The Rationale of the International Community's Legal Position/ 'Unilateral Acts' on Kashmir and the Creation of Estoppel

The formal significance of the legal status of the Kashmir crisis under international law and its effects on the general behaviour of the international community can be explained by the subjective element of custom. As discussed in

260 Annual Coordination Meeting of OIC Foreign Ministers Discusses Main Issues in Muslim World 23/09/2016 <http://www.oic-oci.org/topic/?t_id=11602&ref=4553&lan=en> accessed 12 February 2017.

261 Istanbul Declaration adopted by the 31st Session of The Islamic Conference of Foreign Ministers, Session of Progress and Global Harmony Istanbul, Republic of Turkey 14–16 June 2004.

262 Declaration on Jammu and Kashmir, The Tenth Session of the Islamic Summit Conference, Putrajaya, Malaysia, 16–17 October 2003.

263 Final Communiqué of the Thirty-Third Session of the Islamic Conference of Foreign Ministers Session of Harmony of Rights, Freedoms and Justice, Baku, Republic of Azerbaijan 19–21 June 2006.

264 Nicholas Rostow, 'Before and After: The Changed UN Response to Terrorism since September 11th' (2002) 35 Cornell International Law Journal 475, 488.

265 Final Communiqué of the Thirty-First Session of The Islamic Conference of Foreign Ministers, Istanbul, Republic of Turkey 14–16 June 2004.

266 OIC Prepares for the 71st Session of UN General Assembly and its Annual Coordination Meeting in New York, 17 September 2017 <http://www.oic-oci.org/topic/?t_id=11564&ref=4534&lan=en> accessed 12 February 2017.

Chapter 3, custom is seen as a reflection of states' will, and that 'will' is their 'consent' and becomes a rule.²⁶⁷ Further, The Special Rapporteur under Draft Article 2 defined the unilateral legal acts of states as follows:

[A] unilateral legal act (declaration) means an unequivocal, autonomous expression of will, formulated publicly by one or more States in relation to one or more other States, the international community as a whole or an international organisation, with the intention of acquiring international legal obligations.²⁶⁸

The legal status of such expressions of 'consent' was evaluated by the PCIJ in the *Eastern Greenland Case*,²⁶⁹ which was about the validity of the Norwegian declaration of sovereignty over the eastern part of Greenland.²⁷⁰ Since the separation of the union of Denmark-Norway in 1814, Denmark and Norway had been trying to settle the legal status of Eastern Greenland.²⁷¹ On 22 July 1919, 'the Norwegian Government declared [that] they would not make any difficulties in the settlement of this question'.²⁷² This Norwegian Government statement came to be called the 'Ihlen declaration'. Later that year, Norway reiterated that 'it was a pleasure to... recognise Danish sovereignty over Greenland'.²⁷³

However, on 10 July 1931, the Norwegian Government published a royal proclamation declaring that it had proceeded to occupy certain territories in Eastern Greenland. These territories were claimed by Denmark. On 12 July 1931, the Danish Government instituted proceedings against Norway at the PCIJ.²⁷⁴ The

267 Maurice H Mendelson, 'The Subjective element in Customary International Law' (1995) 66 *British Yearbook of International Law* 177, 180.

268 Unilateral Acts of States, DOCUMENT A/CN.4/500 and Add.1 (Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur) (14 April and 10 May 1999), Draft Article 2, 38.

269 *Legal Status of Eastern Greenland (Denmark. v. Norway)* (5 April 1933) PCIJ (series A/B) No 53.

270 *ibid* 6.

271 Prior to separation, Norway and Denmark were united under the same crown from 1380 to 1814. *Legal Status of Eastern Greenland (Denmark. v. Norway)* (5 April 1933) PCIJ (series A/B) No 53, 9, 13–17.

272 *ibid* 13–17.

273 *ibid* 73.

274 Manley O Hudson, 'Twelfth Year of the Permanent Court of International Justice' (1934) 28(1) *American Journal of International Law* 1, 4.

issue before the court was whether the statements made by the Norwegian officials created a binding obligation under international law that Norway had to honour.²⁷⁵ According to the PCIJ:

As a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland.²⁷⁶

PCIJ further stated:

A [verbal] reply ... given by the Minister for Foreign Affairs on behalf of his Government ... in regard to a question falling within his province, is binding upon the country to which the Minister belongs.²⁷⁷

Judge Anzilotti, in his dissenting opinion, made an interesting observation on the Ihlen declaration. He found no rule of international law 'requiring that agreements of this kind must necessarily be in writing, in order to be valid'. On the question of whether Norwegian constitutional law authorised the Minister for Foreign Affairs to make the declaration, Judge Anzilotti thought it 'does not concern the Danish Government' as:

It was Mr. Ihlen's duty to refrain from giving his reply until he had obtained any assent that might be requisite under the Norwegian laws.²⁷⁸

The PCIJ concluded that the Norwegian minister's statements created a legally binding obligation on the Norwegian government.²⁷⁹ Following the principle

²⁷⁵ *Legal Status of Eastern Greenland (Denmark. v. Norway)* (5 April 1933) PCIJ (series A/B) No 53, 70–72.

²⁷⁶ *Legal Status of Eastern Greenland (Denmark. v. Norway)* (5 April 1933) PCIJ (series A/B) No 53, 73.

²⁷⁷ *Legal Status of Eastern Greenland (Denmark v. Norway)* (5 April 1933) PCIJ (series A/B) No 53, 71; Also see *Unilateral Acts of States*, DOCUMENT A/CN.4/500 and Add.1 (Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur) 14 April and 10 May 1999, para 83.

²⁷⁸ F Castberg, '*Le Conflit entre le Danemark et la Norvège Concernant le Groenland*', (1924) 5 *Revue de Droit International et de Législation Comparée* 252, 261–262.

²⁷⁹ *Legal Status of Eastern Greenland (Denmark. v. Norway)* (5 April 1933) PCIJ (series A/B) No 53, 73.

of estoppel, Norway was prevented from acting contrary to its position by claiming a right to the detriment of the Denmark and was under obligation to accept the latter's sovereignty over Eastern Greenland.

The judgment of the Court, adopted by twelve votes to two, confirmed that the Norwegian declaration of occupation on 10 July 1931 constituted 'a violation of the existing legal situation' and was consequently 'unlawful and invalid'. Following the announcement of the Court's judgment the Norwegian Government revoked the proclamation of 10 July 1931 through the proclamation of 7 April 1933.²⁸⁰

The principle that an 'official statement' can create a legally binding obligation for a state was reviewed by the ICJ in the *Nuclear Tests Case*.²⁸¹ This case involved a dispute between the governments of New Zealand and France concerning the legality of atmospheric nuclear tests conducted by France in the South Pacific. The ICJ, elaborating on the formation of legally binding declarations through *opinio juris*, held:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations...When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking the State being thenceforth legally required [to] follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with intent to be bound, even though not made within the context of international negotiations, is binding.²⁸²

Hence, under international law, a state can be bound by obligations undertaken through unilateral acts. In the *Nuclear Test Case*, the absence of any expression of *opinio juris* by French diplomats did not nullify the French obligation to honour its official declarations to cease nuclear testing. Instead, the court only required that France *intended* itself to be bound by its pledge to cease nuclear testing, even if France did not believe that international law required it.²⁸³

From the *Eastern Greenland* and *Nuclear Test* cases, it becomes apparent that state officials, through their statements, can bind their country to a

²⁸⁰ Hudson, (n 274) 8.

²⁸¹ *Nuclear Tests (New Zealand v France)* (Judgment) (1974) ICJ.Rep 457, 472, para 46.

²⁸² *ibid* para 46.

²⁸³ *ibid* 472–73.

unilateral declaration. The consequence of a state's 'unilateral acts' is to create an estoppel.

Further, the rules reflecting normative standards of behaviour in the international community in relation to legally binding rules and softer international norms are frequently interwoven in the real-life fabric of international law, and the borderline between rules is frequently blurred.²⁸⁴ This is particularly important where the 'soft' instruments, such as the UN SCRs, provide detailed recommendations that assist in moving towards the implementation of binding international law rules, such as the protection of human rights or prohibition of crimes against humanity, prevention of enforced disappearances, etc. Furthermore, if the soft instrument contains monitoring mechanisms that can promote 'binding instruments',²⁸⁵ then such soft instruments must be complied with. Arguably, the UN SCRs on Kashmir give people the right to exercise self-determination through a plebiscite and thereby move towards monitoring mechanisms for binding instruments, such as the ICCPR.

Conformity to these UN SCRs on Kashmir, which formulate the international community's legal position, need to be 'strictly operated'²⁸⁶ against India because they reflect the fundamental values/norms of the international society and are useful in stopping the ongoing human rights violations in Kashmir, which have been taking place for the last 70 years. India is deliberately violating its duty to comply with the UN SCRs on Kashmir and is ignoring the human rights situation, and seems to be working on the assumption that 'the advantages of violations outweigh its costs'.²⁸⁷ However, it is an accepted principle within international law that acquiring territories through aggression and committing human rights violations against occupied people are both unacceptable under *jus cogens* norms.

Keeping in view these discussions, as well as the *Eastern Greenland* and *Nuclear Test Cases*, the fact is that the international community including India and Pakistan, both through their 'collective consent' in the form of UN SCRs and their individual 'unilateral declarations', have bound themselves to

284 Moshe Hirsch, *Invitation to the Sociology of International Law* (OUP 2015) 164–167.

285 Dinah Shelton, 'International Law and Relative Normativity' in Malcolm D Evans (ed), *International Law* (3rd edn, OUP 2010) 165–66; Dinah Shelton, 'Editor's Concluding Note: The Role of Non-Binding Norms in the Legal International Legal System' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 554, 556.

286 Hirsch, (n 284) 168.

287 Louis Henkin, *How Nations Behave – Law and Foreign Policy* (2nd edn, Columbia University Press 1979) 69. Henkin generally discusses why nations violate law.

a legal view on the Kashmir question that they cannot abandon. When like-minded states consented to formulate SCRs on the Kashmir crisis, they created a 'collective legal view' to which they are bound. Such a legal view was created because the international community intended to abide by it.

The practice of the international community with regards to the Kashmir question is of considerable significance in as far as their legal position is concerned. That legal position is made even clearer when we look at the diplomatic history that developed with it. In the case of Kashmir, individual states and unions, by making 'unilateral declarations' as well as 'collective declarations', expressed their intention to be bound by their legal position.

In the case of Kashmir, the 'common consent' or 'belief' was framed into UN SCRs, which can be identified as the international community's legal view. That legal position is binding on it and cannot be violated. Even the states that did not take an active part in the SC deliberations are still party to the SCRs on Kashmir. These resolutions are based on the right to self-determination, which appears in the UNC and International Covenant on Civil and Political Rights (ICCPR), as well as other instruments. All 193 Members of the UNC are *ipso facto* parties to the right of self-determination and 168 states are parties to the ICCPR. Therefore, the majority of states in the world are indirectly parties to the SCRs on Kashmir. India is bound by the same rule of estoppel as the rest of the international community on the basis of the 'unilateral declarations' that it has made, both prior to the Kashmir question being taken to the SC and after it. In one of the many declarations that India has made regarding its willingness to conduct a plebiscite in Kashmir, the Governor General of India, Lord Mountbatten,²⁸⁸ stated, 'the accession would have to be considered by the people of Kashmir'.²⁸⁹

From this statement and the others mentioned above, including the SCRs, it is clear that members of the international community have tied themselves to the commitment to conduct a plebiscite in Kashmir. According to the *Eastern Greenland Case*, this commitment is of a nature that could be found binding by a court of law. As far as Russia is concerned, as discussed in the previous section, their vetoing of a few draft SCRs on Kashmir was their Cold War policy, not their legal position. The USSR did not oppose all the SCRs calling for a plebiscite in Kashmir; many were passed, including Resolution 47 (1948), as well as two UNCIP Resolutions. Hence, the members of the international community

288 FO 371/129775: Letter dated 27 October 1947 from the Governor-General of India, New Delhi to Maharaja of Jammu and Kashmir [NAL].

289 Menon, (n 4) 387.

are prevented, as the subjects of international law to which the unilateral act is imputed, from acting contrary to their declared intent.

The Diplomatic Narrative of International Community's Changing Policies on Kashmir – A Policy of Bilateralism and Its Caveat

As discussed in previous sections, most of the permanent members and UN member states support the SCRs on the Kashmir issue which called for demilitarisation and the conduct of a plebiscite.²⁹⁰ The west even made reference to Kashmir in the Southeast Asia Treaty Organization (SEATO) communiqué of 8 March 1956, stating:

Insofar as these statements concerned Kashmir, members of the Council, noting that UN resolutions remain in force, affirmed the need for an early settlement of the Kashmir question through the United Nations or by direct negotiations.²⁹¹

In SEATO, there were no dissenting voices and all seven SEATO partners – the United-States, Britain, France, Thailand, Australia, New Zealand, and the Philippines – supported the Kashmir plebiscite.²⁹²

As aforementioned, the Soviets opposed such Western endeavours and vetoed two major SCRs in favour of their ally, India. This was an opportune time for India to integrate Kashmir further into its union, resulting in the dismantling of the feeble autonomy mechanisms in Kashmir and the installation of the pro-Indian Kashmir government.²⁹³

However, after the disintegration of the USSR in 1991, India began to improve its relations with Western powers.²⁹⁴ In the late 1990s, India opened its markets and began economic liberalisation. The American trading community exerted pressure on the Clinton Administration to relax its policy towards India. The Clinton doctrine on foreign policy was mainly based on pragmatic realism, but

²⁹⁰ UNSCR 47 (21 April 1948).

²⁹¹ Misra, (n 43), 381.

²⁹² Staff, 'SEATO Nations Endorse Pakistan Plan on Kashmir' *The Cornell Daily Sun* (Ithaca, 8 March 1956) <<http://cdsun.library.cornell.edu/cgi-bin/cornell?a=d&d=CDS19560308.2.4>> accessed 4 February 2017.

²⁹³ See Chapter 4 of this book.

²⁹⁴ Cohen, (n 87), 47–48.

it was influenced by idealism. According to Clinton, democratic enlargement stems from geo-economics.²⁹⁵ Trade policy was, therefore, the *sine qua non* of sound foreign policy, as the presence of market-based democracies would render the world a safer, richer place.²⁹⁶ America was no longer concerned with the bloody and unprofitable civil and religious wars that raged from Angola to the Caucasus to Kashmir. Only when anarchy reigned in a major trade pact region like Bosnia and Northern Ireland did Clinton play the role of global peacemaker.²⁹⁷

Overall, the stated priority was democratic enlargement, but the only source of apprehension was the possibility of nuclear war between India and Pakistan. The nuclear tests by India and Pakistan in 1998 alarmed western powers, as both were outside the NPT and CTBT.

The policy of Bush Jr's government on Kashmir showed that they were unwilling to mediate a dialogue between India and Pakistan²⁹⁸ and instead emphasised bilateralism, stemming from the 1972 Simla Agreement. The Simla Agreement of 1972 created the tradition of bilateralism on the Kashmir issue and some scholars believe that this agreement categorically prevented the resolution of the Kashmir crisis.²⁹⁹ It was followed by the Lahore Declaration in 1999. The main provisions of this declaration were to intensify dialogue between the two governments to 'resolve all issues', including Kashmir, and to work towards confidence-building in nuclear and conventional military terms.³⁰⁰ This peace declaration did not last for long and in May 1999, the fourth war started between India and Pakistan in the mountainous areas north of Kargil and Dras.³⁰¹

295 Douglas Brinkley, 'Democratic Enlargement: The Clinton Doctrine' (1997) 106 *Foreign Policy* 110, 112.

296 *ibid* 117.

297 *ibid* 117.

298 Navnita Chadha Behera, 'Kashmir: Redefining the U.S. Role' (*Brookings Policy Brief Series* No 110, November 2002) <<https://www.brookings.edu/wp-content/uploads/2016/06/pb110.pdf>> accessed 4 March 2017.

299 Ishtiaq Ahmed, 'The 1947 Partition of India and Pakistan: A Paradigm for Pathological Politics in India and Pakistan', (2002) 3 *Asian Ethnicity* 9–28; Nilanjan Raghunath, 'Jammu and Kashmir: Competing Concepts of Nationalism' [2006–2007] 2 *Yale Journal of International Law* 44, 45.

300 The Lahore Declaration (21 February 1999).

301 Staff, 'Behind the Kashmir Conflict: Abuses by Indian Security Forces and Militant Groups Continues' (*Human Rights Watch* 1999) <<http://www.hrw.org/reports/1999/kashmir/>> accessed 1 December 2016.

In July 2001, the Agra Summit took place as another attempt to improve bilateral relations between India and Pakistan.³⁰² The initial optimism of the Agra Summit ended in utter disappointment when no agreement was signed. In 2003, the PM of India, Vajpayee, in announcing a major effort to find peace with Pakistan, suggested step-by-step improvements in relations between the two countries prior to dealing with the Kashmir issue. Pakistan accepted this approach, which was followed by a number of Confidence Building Measures (CBMs) throughout the year including the restoration of diplomatic relations, the opening of the bus route,³⁰³ the ceasefire across the Line of Control (LoC), and the restoration of sporting contacts.³⁰⁴

There was a further exchange of goodwill between the two countries after the earthquake in Kashmir on 8 October 2005.³⁰⁵ As mentioned, the then-President of Pakistan, General Musharraf, in order to break the impasse on the Kashmir question, proposed a 'four point proposal'. It included the withdrawal of the army, an Indo-Pak joint supervisory mechanism over Kashmir, self-governance by Kashmiris, and the making of the LoC irrelevant by allowing for free movement.³⁰⁶

However, promoting bilateralism has mainly meant leaving the people of Kashmir to the changing tides, and the breakdown in talks is often accompanied by increased violence. It has caused the further loss of thousands of lives, allowed for massive and widespread human rights violations, and has been a factor in the spread of militarism. Kashmir's APHC³⁰⁷ leader, Ali Shah Geelani, best explained the outcome of bilateral negotiations when he stated; 'We are fed up with the talks of confidence building. The real issue is the occupation of Jammu and Kashmir by Indian troops.'³⁰⁸

India, ever since the Simla Agreement, has maintained that it lays out the only solution that is on offer for the Kashmir conflict and argues that it

302 Staff, 'The Agra Summit, meeting from 14–16th July 2001' (*BBC News* 17 July 2001) <http://bbc.co.uk/1/hi/world/south_asia/1430367.stm> accessed 2 December 2016.

303 Staff, 'Bus Connects Kashmir' *Greater Kashmir* (Srinagar, 8 April 2005) 1.

304 S Baid, 'Too Much of Hype' *Greater Kashmir* (Srinagar, 23 April 2005) 7.

305 The government of India and Pakistan have been slow to start reconstruction programs to help the people in this region. It can be argued and speculated that, because Kashmir is still disputed region, the two governments may not want to spend money on a place that they are not sure belongs to them.

306 Staff, 'Musharraf pushes Kashmir proposal' (*BBC News*, 12 May 2006) <http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/6208660.stm> accessed 15 November 2007.

307 All Party Hurriyat Conference.

308 Staff, 'Historic Kashmir talks bring hope' (*BBC News*, 22 January 2004) <http://news.bbc.co.uk/2/hi/south_asia/3416823.stm> accessed 2 December 2016.

has invalidated the UN SCRs on Kashmir. However, before one can conclude whether the Simla Agreement³⁰⁹ invalidates the UN SCRs on Kashmir, it is imperative to examine the genesis of this agreement.

In March 1971, about 10 million refugees crossed the border into India as a result of a crackdown by the Pakistani army in East Pakistan. The then-PM of India, Mrs Indira Gandhi, decided that it would be cheaper to go to war than to absorb the refugees into the Indian population.³¹⁰ On 17 December 1971, Indian forces, with the help of Russia, intervened and this resulted in the formation of the independent state of Bangladesh.³¹¹ The Pakistani army was defeated and they surrendered.³¹² The Simla Agreement that followed the East Pakistan conflict stated that India and Pakistan should endeavour 'to settle their differences by peaceful means through bilateral negotiations or by any other peaceful means mutually agreed upon between them'.³¹³ It has to be understood however that the Simla agreement was a sort of peace agreement between India and Pakistan and it was not directly connected to the resolution of Kashmir issue. The pressing issues such as withdrawal of the armed forces or questions of repatriation of prisoners of war were directly related to the Indo-Pakistani war of 1971 and had nothing to do with Kashmir apart from legalising the territorial gains in Kashmir which Indian forces gained in the territory along the line of control.³¹⁴ As Farrell correctly argues, the majority of fighting took place in East Pakistan but Indian forces in Kashmir also took the advantage of the hostilities³¹⁵ and gained some territory along the LoC.³¹⁶ Para 4(ii) of the Simla Agreement (1972) states:

In Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice

309 The Simla Agreement was signed between Zulfikar Ali Bhutto (President of Islamic Republic of Pakistan) and Indira Gandhi (Prime Minister of Republic of India) in Simla on 2 July 1972.

310 Sumit Ganguly, *The Crisis in Kashmir: Portents of War, Hopes of Peace* (CUP 1997) 58.

311 Stephen Philip Cohen, *Idea of Pakistan* (Brookings Institution Press 2004) 201, 203.

312 Brian Farrell, 'The Role of International Law in the Kashmir Conflict' [2002–2003] 21 Penn State International Law Review, 293, 304–305.

313 The Simla Agreement (2 July 1972) para 1(ii).

314 Richard Sisson and Leo Rose, *War and Secession: Pakistan, India and the Creation of Bangladesh* (University of California Press 1990) 234; Farrell, (n 312), 304.

315 *ibid* 304.

316 Sisson and Rose, (n 314), 234; Farrell, (n 312) 304.

to the recognized position of either side. Neither side shall seek to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this Line.

Clearly the relevance of the Simla Agreement for Kashmir is limited to an altered position of line of control that happened subsequent to war and not directly related to resolving the Kashmir question bilaterally while ignoring the exercise of right to self-determination of Kashmiri people. The post-war settlement agreement between the two nations cannot unilaterally displace the right to self-determination of Kashmiri people that has been granted to them through the UN SCRS.

Hence arguably, the Simla Agreement did not require the Kashmir issue to be resolved bilaterally, although it was desirable.³¹⁷ However, India took the position that the Kashmir question had to be resolved through 'bilateral negotiations' and denounced the 'UN involvement'.³¹⁸ On the other hand, Pakistan continued to see Kashmir as an international dispute governed by the UN SCRS.³¹⁹ In February 1994 the late PM of Pakistan, Benazir Bhutto, raised the Kashmir question at the UNCHR at Geneva.³²⁰ It is argued that the Simla Agreement (to which the people of Kashmir are not party) cannot take away their right to decide their future, which is a right recognised in the SCRS.

Further, the SCRS take precedence over the Simla Agreement and this position is supported by the Simla Agreement itself to a large extent, as it affirms that the UNC will continue to 'govern the relations between the two countries'.³²¹ Furthermore, Article 103 of the UNC states in unambiguous terms that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

³¹⁷ The Simla Agreement 2 July 1972, para 6.

³¹⁸ Christopher Snedden, 'Would a Plebiscite have resolved the Kashmir Dispute?' (2005) xxviii South Asia: Journal of South Asian Studies 64, 64.

³¹⁹ In October 2007, Pakistan hired the former US Assistant Secretary of State for South Asia, Robin Raphael, to lobby for Islamabad in Washington. She now is the vice-president of a government relations firm called Cassidy and Associates.

³²⁰ Victoria Schofield, *Kashmir in the Crossfire* (Viva Books Private Limited 1997) 289.

³²¹ The Simla Agreement (2 July 1972) para 1(i).

Article 103 obligations extend to the decisions contained in SCRs as, under Article 25 of the UNC, members of the UN agree to accept and carry out the decisions of the SC.³²² Clearly the international community cannot insist on promoting bilateralism as it contravenes their Charter obligations under the UN SCRs on Kashmir. In the *Nicaragua* Case, after disposing of the other issues, the ICJ stated that 'all the regional, bilateral and even multilateral arrangements' made by the parties 'touching on the issue of settlement of dispute must be made always subject to the provisions of the Article 103 of the UNC'.³²³

The proposition that the Kashmir question has not been transformed into a bilateral issue is also supported by the fact that the mandate of UNMOGIP has not lapsed after the signing of the Simla Agreement. This observer group was deployed in January 1949 to supervise the ceasefire between India and Pakistan and continues to do so even though the ceasefire line was changed into the Line of Control by the Simla Agreement. The Line of Control is not the legitimate and permanent *de jure* international border.³²⁴ India, after the conclusion of the Simla Agreement, did take the position that the mandate of UNMOGIP should be terminated. However, Pakistan did not accept this proposal. The Secretary General's position was that the UNMOGIP could only be terminated by a decision of the SC.³²⁵ In the absence of such a decision, the UNMOGIP continues with the same mandate and functions.

The Simla Agreement was neither a laudable milestone in terms of bilateralism nor a useful step in resolving the Kashmir question. However, both the Simla Agreement and the Lahore Declaration emphasise the necessity of following the principles in the UNC, and that includes not displacing UN SCRs, the status of which is derived from the UNC. Essentially, in situations where human rights are systematically violated, there is no limitation to pursuing the aims of the SCRs outside bilateral talks such as through UN mechanisms, despite Indian resistance.³²⁶

322 Giuliano Amato and Jacques Ziller, *The European Constitution: Cases and Materials in EU and Member States* (Edward Elgar Publishing 2007) 269.

323 ICJ Reports 392 (1984) para 107.

324 Indian side tried this earlier in 1963 in the sixth and final round of talks with Pakistan on Kashmir but Bhutto rebuffed them. See, MJ Akbar, *Kashmir: Behind the Vale* (Viking 1991) 175; AG Noorani, 'Kashmir: The Lost Opportunity', *Illustrated Weekly of India* (7 September 1986) 50–53.

325 UNMOGIP <<http://www.un.org/Depts/dpko/missions/unmogip/background.html>> accessed 10 December 2016.

326 Art 1, United Nations Charter (1945); Kurt Mills, 'Reconstructing Sovereignty: A Human Rights Perspective' (1997) 15 *Netherlands Quarterly of Human Rights* 267, 283; Louis Henkin, 'Human Rights and State Sovereignty', (1995–1996) 25 *Georgia Journal of International and Comparative Law* 31, 33.

As seen in the ongoing bloodshed, bilateralism has proved unproductive as far as the resolution of the Kashmir issue is concerned.³²⁷ The professed bilateral agreements and dialogues only last as long as the leaders involved in them continue to be in power.³²⁸ India has rejected third party mediation and is sheltering under bilateralism. This must be understood as an Indian mirage, created exclusively for international broadcast, to allow them to claim that there has been progress on the Kashmir question. The 2016 unrest and killings in Kashmir perpetrated by the security forces demonstrate that even after 70 years of conflict the Kashmiri people continue to claim their right to self-determination, which is supported international instruments and bodies, as well as by parliamentarians in the UK.³²⁹

India starts every bilateral negotiation on the premise that Kashmir is an integral part of India and that India's boundaries are fixed, final, and non-negotiable. That premise leaves little scope for negotiation. If India refuses to negotiate on the core of the Kashmir question—³³⁰ the sovereignty of Kashmir—deadlock is inevitable.³³¹ Criticising the bilateral negotiations, the Democratic Freedom Party leader Shabir Ahmed Shah (IOK) said that 'the basic negotiating tactics of India with respect to the sovereignty over Kashmir have not changed' and therefore described the talks as 'much ado about nothing'.³³²

In terms of diplomatic interventions, the international community seems to have subscribed to bilateralism as the way to resolve the Kashmir crisis,

327 Anthony Wanis St. John, 'The Mediating Role in the Kashmir Dispute between India and Pakistan' (1997) 21 *Fletcher Forum of World Affairs* 173, 191.

328 All the past accords, like the Tashkent Agreement 1965, Simla Agreement 1972 and Lahore Declaration 1999, were signed between different leaders from both sides and ceased to be in operation soon after they lost power.

329 Kashmir, House of Commons, Hansard vol 619 (19 January 2017). <<https://hansard.parliament.uk/Commons/2017-01-19/debates/5E3E7217-2415-4B94-8748-3D9E6B1E759B/Kashmir>> accessed 1 February 2017.

330 Sisson and Rose, (n 314) 5, 234.

331 Birdwood, (n 24) 262; Express Web Desk, 'Nawaz Sharif at UNGA: Peace cannot be achieved between India and Pakistan without resolving Kashmir dispute' *Indian Express* (Noida, 22 September 2016) <<http://indianexpress.com/article/world/world-news/nawaz-sharif-unga-kashmir-dispute-india-pakistan-3042919/>> accessed 21 February 2017; see generally, Dennis Kux, *India-Pakistan Negotiations: Is Past Still Prologue?* (United States Institute of Peace 2006).

332 Staff, 'Historic Kashmir talks bring hope' (*BBC News* 22 January 2004) <http://news.bbc.co.uk/2/hi/south_asia/3416823.stm> accessed 2 December 2016.

which in effect is supporting India's unrealistic proposition³³³ and has left the Kashmir question unresolved for the last 70 years. After the catastrophic 9/11 attacks,³³⁴ after which America turned to the 'fight against terrorism', the British Prime Minister, Tony Blair, took no time in clubbing Kashmir in with Iraq, Afghanistan, Palestine, and Chechnya, calling it a fertile ground for extremism.³³⁵

America considered Pakistan its key ally in the region.³³⁶ During the October 2001 bombing of Afghanistan, Pakistan provided critical logistic support to the US by allowing them to use its air bases and station troops, sharing intelligence and permitting joint military operations on its own soil. Throughout the Bush Jr administration, the American focus remained on Al-Qaeda and the 'war against terror'.³³⁷ Unfortunately, to take advantage of the international mood after 9/11, India started to call the uprising in Kashmir against its occupation terrorism, ignoring the fact that the Kashmir dispute started in 1947. Under the banner of the 'war on terror', India since then has successfully imposed further draconian laws in Kashmir, killing innocent people in fake encounters and then labelling them as terrorists.³³⁸

The UK showed its commitment to supporting India and Pakistan financially in their conflict prevention efforts and has in place an India-Pakistan Global Conflict Prevention Pool Fund that supports projects aimed at facilitating dialogue and addressing the causes and impact of conflict in the region. It is a joint initiative between the Foreign and Commonwealth Office, the Ministry of Defence, and the Department for International Development.³³⁹ However,

333 SAA Khan, 'Imperatives of Peace' in K.R. Sawhny (ed), *Kashmir-How far can Vajpayee and Musharraf Go?* (Peace Publications 2001) 24.

334 Lawrence Azubuike, 'Status of Taliban and Al Qaeda Soldiers: Another Viewpoint' (2003) 19 Connecticut Journal of International Law 127, 136; Staff, 'Chronology of Terror' (*CNN* 12 September 2001) <<http://europe.cnn.com/2001/US/09/11/chronology.attack/>> accessed 21 March 2006.

335 Staff, 'Blair "takes on" Iraq war critics' (*BBC News*, 21 March 2006) <http://news.bbc.co.uk/2/hi/uk_politics/4827680.stm> accessed 2 December 2016.

336 Navnita Chadha Behera, *Demystifying Kashmir* (Brookings Institution Press 2006) 227.

337 Behera, (n 298).

338 Arif Shafi Wani, 'SHRC Resents police circular in human rights violations report' *Greater Kashmir* (Srinagar, 18 June 2007) <<http://m.greaterkashmir.com/news/news/shrc-resents-police-circular-on-human-rights-violations-report/18946.html>> 2 December 2016; I Dev, 'Three Youth Killed in 'Fake Encounter' *Greater Kashmir* (Srinagar, 26 June 2007) 1.

339 Email from G Williams (FCO Research Analysts, South & South East Asia Research Group, London) to the author (26 November 2007).

there is a strong argument that leaving the resolution of the conflict to bilateral talks is itself a source of the conflict in Kashmir, as the Kashmiri people are not credibly included in the dialogue. Therefore, by funding this dialogue, the UK is unintentionally fuelling the hostility. The lack of acknowledgement of this contradiction can be seen, for example, in Baroness Scotland's response to Lord Ahmed's question of 'whether UK supports the UN Resolutions pertaining to Kashmir' during the House of Lords Debates on 2 May 2000:

We believe that India and Pakistan should build on both the UN Resolutions and the 1972 Simla Agreement in their search for a solution to Kashmir. We continue to encourage both countries to return to bilateral dialogue to find a just and lasting solution acceptable to the people of Kashmir.³⁴⁰

This statement summarises Western diplomatic policy towards Kashmir.³⁴¹ The international community focuses on bilateral negotiations between India and Pakistan, but at the same time it does not step away from its pre-1971 position, which is that the 'people of Kashmir are entitled to self-determination'. A major obstacle to resolving the Kashmir question is a lack of emphasis on finding a more practical way to help the people achieve that right, and this has jeopardised a just and speedy resolution of the Kashmir question.

The key to making a difference in the Kashmir situation is to shift the focus from Indo-Pakistani territorial disputes to addressing the political needs of the Kashmiri people.³⁴² Therefore, the only way forward is that the international community must agree to give up the *status quo* in order to achieve a final, just, and lasting solution in Kashmir. Bilateralism is a very conformist approach and doesn't produce any dividends if practiced where human rights or human security is at stake, such as in Kashmir. Although bilateralism may maintain the *status quo* between the nations and facilitate trade, it cannot uphold long-term international peace, prevent terrorism, or improve the welfare of subaltern groups such as Kashmiris, who remain caught up in constant Indo-Pakistani wars.

340 *House of Lords Debates*, 2 May 2000, c147w.

341 US Department of State (n 91); email from G Williams (FCO Research Analysts, South & South East Asia Research Group, London) to the author (26 November 2007); EP, (n 246), para 1.

342 Behera, (n 298).

Clearly, the strict devotion to non-interference and bilateralism are proving counterproductive and hazardous to human security and human rights protection in Kashmir. Intransigence, prevarication, and the *status quo* are dangerous and this has been recognised by the SC as evidenced by SCRs 774,³⁴³ 902,³⁴⁴ and 1203,³⁴⁵ which clearly demonstrate that an unresolved situation could constitute a continuing threat to peace and security. SCR 1429 (2002) in the case of *Western Sahara* stated that the lack of progress in the settlement of the dispute remained a source of political instability in the region.³⁴⁶ The same holds true in the case of Kashmir, where a lack of agreement on the status of the territory has left people in political limbo. The 70 years of failure to negotiate in good faith on the Kashmir question constitutes a simmering threat.³⁴⁷ In the *Lockerbie* case, the fact that 'efforts to resolve the dispute peacefully had not yet been completely exhausted' did not prevent the SC from considering the situation as a threat to peace.³⁴⁸

The Necessity for Aligning the International Community's Fundamental Obligations with Their Foreign Policy on Kashmir: A Critical Review

The discussions in Chapters 4 and 5 demonstrate that under international law, the people of Kashmir are entitled to the restoration of historical title, which was not negated after the 1947 illegal annexation. Their claim for self-determination is also based on the presence of an unrepresentative government and gross human rights violations. This has the implicit support of the principle of *ex injuria ius non oritur*,³⁴⁹ which is accepted by most states. The American legal position on illegal occupation, known as the Stimson's doctrine, clearly affirms that the US does not recognise the legality of any international

343 UN Res 774 (26 August 1992) para 10.

344 UNSCR 902 (1994), Achieving of an agreement on the confidence building measures relating to Varosha and Nicosia International Airport, Cyprus, para 1.

345 UNSCR 1203 (1998) on the situation in Kosovo.

346 'The Situation Concerning Western Sahara' (30 July 2002) UNSCR 1429, Preamble.

347 'The Situation in Bosnia and Herzegovina, particularly in the safe area of Gorazde and political settlement of the situation in the former Yugoslavia' (22 April 1994) UNSCR 913.

348 Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 *Journal of Conflict & Security Law* 15, 35–36.

349 Marek, (n 306), 329.

territorial changes achieved through the use of force.³⁵⁰ This principle is also accepted internationally. However, this analysis of the legal position and foreign policy towards Kashmir has brought to light the reality that the international community's political or diplomatic inclinations have not always been in line with the legal position to which it has tied itself. As already discussed in relation to the *Eastern Greenland Case*, the international community is under an obligation to implement their legal obligations and make sure that the people of Kashmir express their will through a democratically conducted plebiscite. It is argued that there are at least three important pressing issues that must exhort the international community to take prompt action on the ongoing Kashmir crisis, namely: (1) maintaining nuclear stability in South Asia; (2) preventing the spread of terrorism into Kashmir and (3) halting the gross violations of human rights in Kashmir.

Kashmir Dispute: Nuclear Stability in South Asia and Terrorism

India and Pakistan stunned the world when they openly tested their nuclear weapons in May 1998. The threat of nuclear war hangs like the sword of Damocles over South Asia and, indeed, the world. Both India and Pakistan covertly acquired nuclear weapons technology in order to become *de facto* nuclear states.³⁵¹ Their nuclear tests were condemned internationally and resulted in US sanctions.³⁵² However, these reprisals did not last for long.³⁵³

Many believe that nuclear armament in South Asia could prove disastrous³⁵⁴ and a study has estimated that in the event of a 'limited' nuclear war

350 Richard N. Current, 'The Stimson Doctrine and the Hoover Doctrine' (1954) 59 (3) *The American Historical Review* 513, 523.

351 Kevin M Brew, 'The Re-Emergence of Nuclear Weapons as "The Coin of the Realm" and the Return of Nuclear Brinkmanship in South Asia: The Nuclear Sword of Damocles still Hangs by a Thread' (2005) 52 *Naval Law Review* 177.

352 Staff, 'South Asia's High Nuclear Stakes' (*BBC News* 7 May 2003) <http://news.bbc.co.uk/1/hi/world/south_asia/1732430.stm> accessed 21 October 2005.

353 Brew, (n 351), 212.

354 See generally, Christophe Carle, 'International Security in a Nuclear South Asia' in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press 2004); Stephen P Cohen, 'Nuclear Weapons and Nuclear War in South Asia: Unknowable Futures' in Ramesh Thakur and Oddny Wiggen (trs), *South Asia in the World: Problem Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press 2004).

between India and Pakistan, using 10 Hiroshima-sized devices would kill as many as three to four times more people per bomb than in Japan because of the higher urban densities in Indian and Pakistani cities.³⁵⁵ India and Pakistan accelerated their nuclear quests as a reaction to their respective traumatic defeats in the Sino-Indian border conflict in 1962 and the Bangladesh war in 1971.³⁵⁶ The possession of nuclear weapons by India and Pakistan can have regional and global consequences since neither country is a signatory to the Non-Proliferation Treaty (NPT 1995)³⁵⁷ or the Comprehensive Nuclear-Test-Ban Treaty (CTBT 1996).³⁵⁸ Hence there remains a risk that they are not committed to supporting the goals of achieving a total ban of nuclear weapons, bans on all nuclear explosions³⁵⁹ for both civilian and military purposes, comprehensive prohibition of nuclear weapons, prevention of the spread of nuclear weapons and weapons technology, or complete disarmament of nuclear weapons.³⁶⁰ Put simply, the obligation to refrain from acquiring nuclear weapons does not apply to India and Pakistan under treaty law, because they are not party to the relevant treaty.³⁶¹ India believes that these treaties are 'discriminatory'³⁶² towards the non-nuclear weapons states as it does not reflect 'an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear

355 Natural Resources Defense Council, 'The Consequences of Nuclear Conflict between India and Pakistan', 4 June 2002.

356 P Chari, 'Pokharan-I: Personal Recollections' (2009) 80 Institute of Peace and Conflict Studies Special Report 1, 8. <www.ipcs.org/pdf_file/issue/SR80-Chari-Final.pdf> accessed 7 February 2017.

357 Treaty on the Non-Proliferation of Nuclear Weapons, 1970, 729 U.N.T.S. 161; Opened for signature in 1968, the Treaty entered into force in 1970.

358 United Nations General Assembly, 10 September 1996.

359 Chari, (n 356); Ashok Kapur, *India's Nuclear Option: Atomic Diplomacy and Decision-making* (Praeger Publishers 1971) 194.

360 See generally, James A Green, 'India's Status as a Nuclear Weapons Power Under Customary International Law' (2012) 24(1) National Law School of India Review 125.

361 *ibid* 126, 130; Steven G Stransky, 'The Nuclear Nonproliferation Treaty and Pakistan: Interpreting Nuclear Security Assistance Prohibitions' (2011) 23 Florida Journal of International Law 1; Treaties do not directly bind non-parties. See Vienna Convention on the Law of Treaties, (1969) 1155 U.N.T.S. 331, art 34 of which provides that '[a] treaty does not create either obligations or rights for a third State without its consent'.

362 William Epstein and Paul C Szasz, 'Extension of the Nuclear Non-proliferation Treaty: A Means of Strengthening the Treaty' (1993) 33 Virginia Journal of International Law 735, 761; Sergio Duarte, 'Nuclear Weapons and the Rule of Law' [2009–2010] 33 Fordham International Law Journal 573, 576.

Powers' which is embodied by the General Assembly Resolution 2028 (XX).³⁶³ Hence NPT does not reflect the balance of responsibilities between the nuclear states and the non-nuclear states.³⁶⁴ Their unwillingness to make official commitments may indicate that India and Pakistan may be willing to use nuclear weapons if their leaders believe that the survival of their state is at stake.³⁶⁵ In line with this state of mind, on 12 March 2004, the External Minister of India stated: '*...in a world where weapons of mass destruction are still to be eliminated nuclear weapons sadly remain the ultimate guarantor of a nation's security...it was the imposition of an imperfect non-proliferation order...that compelled us to make the transition from nuclear abstinence to that of a reluctant nuclear power...*'³⁶⁶

It is a known fact that India and Pakistan are arch-rivals and recent political developments in these countries remain guided by power-wrangling and religious nationalism³⁶⁷ rather than by secularism or international law reasoning. Specifically, the chaos of the region has been compounded by the different ideas of nationalism which have emerged in both India and Pakistan and are now competing for hegemonic control in Jammu and Kashmir.³⁶⁸ India and Pakistan seek to assimilate Jammu and Kashmir into their larger nationalist visions.³⁶⁹ These countries have already fought four wars over Kashmir, and some now believe that this conflict contains the 'seeds of a nuclear holocaust'.³⁷⁰ Arguably, the non-resolution of the Kashmir crisis can fuel a

363 Non-Proliferation of Nuclear Weapons 2(b) (Nov 19, 1965) UNGA Res 2028 (XX) U.N. Doc. A/RES/2028(XX).

364 See generally, David S Jonas, 'Variations on Non-Nuclear: May the 'Final Four' Join the Nuclear Non-proliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?' (2005) Michigan State Law Review 417, 426. It is argued that the 'Grand Bargain' of the NPT is that the Nuclear Weapon States will work towards nuclear disarmament and will share the benefits of the peaceful uses of nuclear energy with the Non-Nuclear Weapons States, who in turn must refrain from acquiring nuclear weapons and place their nuclear facilities under international safeguards.

365 Geoffrey Robertson, *Crimes against Humanity-The Struggle for Global Justice* (2nd edn, Penguin Books 2000) 207.

366 Staff, 'P.M, Sinha brandish "brand India"' *The Tribune* (Chandigarh, 13 March 2004) <<http://www.tribuneindia.com/2004/20040313/main3.htm>> accessed 17 February 2017.

367 Ashutosh Varshney, 'India, Pakistan, and Kashmir: Antinomies of Nationalism' (1991) 31 Asian Survey 997, 997; Raghunath (n 299), 49.

368 Raghunath, (n 299) 45.

369 *ibid.*

370 Brew, (n 351) 178–79.

violent cycle of provocation and response that might spin into a potential nuclear war between India and Pakistan.³⁷¹ The hazards of constant military actions and reactions as well as the somewhat unpredictable nature of Indo-Pakistani security relations could lead to nuclear war between the two nations.³⁷² In the context of nuclear wars, President John F Kennedy correctly stated: 'Every man, woman, and child lives under a nuclear sword of Damocles, hanging by the slenderest of threads, capable of being cut at any moment by accident or by miscalculation or by madness'.³⁷³ This very much holds true in case of India and Pakistan as they twice (in 1990 and 2001–2) nearly resorted to the use of nuclear weapons over the Kashmir conflict.³⁷⁴

The Indian attitude to the danger of nuclear warfare over Kashmir can be seen in a report of the Kargil Review Committee, appointed by India to assess the Kargil War of 1999 between India and Pakistan.³⁷⁵ The report suggested that during the Kargil War India was not in a position to control hundreds of kilometres of uninhabited wilderness in the high mountains of the northern borders of Kashmir through posting troops.³⁷⁶ The report concluded that, in such circumstances, 'India cannot be accused of risking nuclear escalation for defending its territory'.³⁷⁷ The Kargil Committee report therefore clearly suggests that India was prepared to use nuclear weapons.

The 13 December 2001 terrorist attack on the Indian Parliament almost led to a fully-fledged India-Pakistan nuclear war. Shortly after the attacks, India mobilised its forces and on 19 December 2001 launched Operation *Parakram*.³⁷⁸ Pakistan prepared to 'counterattack' due to the mobilisation of Indian forces

371 Ganguly and Kapur, (n 16) 59–60; Karen Heyman, 'Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust' (2003–2004) 19 *American University International Law Review* 153, 156.

372 Ganguly and Kapur, (n 16) 46; S Paul Kapur, *Dangerous Deterrent: Nuclear Weapons Proliferation and Conflict in South Asia* (Stanford University Press 2007); Devin T Hagerty, *The Consequences of Nuclear Proliferation: Lesson from South Asia* (MIT Press 1998).

373 US President John F Kennedy, Address before the General Assembly of the United Nations in New York City, 25 September 1961.

374 Ganguly, (n 67) 45.

375 Kargil Committee, *From Surprise to Reckoning: The Kargil Review Committee Report* (Sage Publications 2000) 221, para 12.5.

376 *ibid* para 12.3.

377 *ibid* para 12.5.

378 Shweta Moorthy, 'Operation Parakram' (Inst. Peace & Conflict Stud, Article No 1654, 22 February 2005) <<http://www.ipcs.org/article/india/operation-parakram-1654.html>> accessed 4 March 2017.

along the border.³⁷⁹ The US played a positive diplomatic role to avert nuclear disaster,³⁸⁰ realising the lingering nuclear threat in the region.

President Clinton stated that, 'The most dangerous place in the world today, I think you could argue is the Indian subcontinent and the line of control in Kashmir'.³⁸¹ Clearly, the establishment of a nuclear deterrence in South Asia has not prevented wars (including proxy wars) or terrorist attacks, cross-border insurgency, indiscriminate killings, or property damage within India and Pakistan or in the region generally. Indeed, the nuclear armament of South Asia, which started off with Pokharan-I, has only further destabilised the region.

The nuclear threat over the conflict in Kashmir is even greater because within international law there has been no definitive conclusion about the prohibition on the use of nuclear weapons.³⁸² The ICJ in its advisory opinion on the *Legality of the threat or use of Nuclear Weapons*³⁸³ stated that:

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons...the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.³⁸⁴

379 Brew, (n 351) 184.

380 Remarks at the American Enterprise Institute Symposium, John D. Negroponte, Deputy Secretary of State, 23 October 2007.

381 Jonathan Marcus, 'Analysis: The World's Most Dangerous Place?' (*BBC News*, 23 March 2000) <http://news.bbc.co.uk/1/hi/world/south_asia/687021.stm> accessed 11 December 2007.

382 Richard A Falk 'Nuclear Weapons, International Law and the World Court: A Historic Encounter' (1997) 91 *American Journal of International Law* 64; David Harris and Sandesh Sivakumaran, *Cases and Materials on International Law* (8th edn, Sweet and Maxwell 2015) 794–801.

383 *The Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) (8 July 1996) 1CJ Rep 1996, 226.

384 *ibid* paras 49–73, 105.

The ICJ accepted that the *lex lata* emergent customary rules specifically prohibiting the use of nuclear weapons are in fact hampered both by certain *opinio juris* as well as the adherence to the doctrine of deterrence, which holds that the right to use those weapons as self-defence against an armed attack that threatens the vital security interests of the state has a deterring effect on other states using nuclear weapons.³⁸⁵

Hence, the use of nuclear weapons is arguably not under the effective control of international law and states can, based on their own judgement of about whether an external armed attack has the potential to threaten their existence, use nuclear weapons in self-defence. The volatile Indo-Pakistani relationship and their attitude to the Kashmir dispute have always involved provocations and confrontations. During the 2016 Kashmir unrest³⁸⁶ as well as on many other occasions there have been continuing worrisome activities along the Line of Control between India and Pakistan, including exchanges of fire and troop movements.³⁸⁷ Such events have been common since 1947, and it is difficult to rule out the possibility of provocative steps being taken by either side that could lead to miscalculation and the possible escalation³⁸⁸ of nuclear warfare.

Preventing the Kashmir Conflict from being Hijacked by International Terror Groups

This region is also affected by the change in the geopolitical landscape after the catastrophic 9/11 terror attacks in the US, in which Al-Qaeda terrorists killed almost 3,000 civilians from more than 60 countries.³⁸⁹ The US launched

385 *ibid* paras 49–73.

386 Ellen Barry and Salman Masood, 'India Claims "Surgical Strikes" Across Line of Control in Kashmir' *New York Times* (New York, 29 September 2016) <https://www.nytimes.com/2016/09/30/world/asia/kashmir-india-pakistan.html?_r=0> accessed 17 February 2017; Andrew Marszal, 'Pakistan fury after India conducts military strikes on Kashmir border' *The Telegraph* (Calcutta, 29 September 2016) <<http://www.telegraph.co.uk/news/2016/09/29/pakistan-fury-after-india-conducts-military-strikes-on-kashmir-b/>> accessed 17 February 2017; Jon Boone, 'Pakistani troops killed by Indian shelling in Kashmir, says military' *The Guardian* (London, 14 November 2016) <<https://www.theguardian.com/world/2016/nov/14/pakistani-troops-killed-by-indian-shelling-in-kashmir>> accessed 17 February 2017.

387 Karl F. Inderfurth, 'India-Pakistan Nuclear Tests [comments]' (1998) 9(5) *US Department of State Dispatch* 15, 15.

388 *ibid* 15.

389 Mark A Drumbl, 'Terrorist Crime, Taliban Guilt, Western Victims, and International Law' (2002–2003) 31 *Denver Journal of International Law and Policy* 69.

the war against terrorism with Pakistan as a key regional ally.³⁹⁰ Pakistan provided critical logistical support to the US by allowing them to use its air bases and station troops, sharing intelligence, and permitting joint military operations on its own soil to track down Al-Qaeda.³⁹¹ The fight against terrorism united the world and even Russia pledged, through the NATO-Russia Council, to join the West for joint assessments of terrorist threats.³⁹² President Putin voiced his strongest support for the American-led coalition against terrorism.³⁹³ Steps were taken to bring the NATO Allies and Russia together to work as partners to address the challenges of the 21st century, including joint assessments of terrorist threats.³⁹⁴ The Russian relationship with the West led to their participation in the OSCE, involvement in the Council of Europe, ratification of the ECHR, participation in the G8, etc. By the presidential directive of 5 July 1999, Russian servicemen were assigned to the UN Mission in East Timor (UNAMET) to serve as liaison officers to the Indonesian military.³⁹⁵ Likewise, China advocated the 'common responsibility' to maintain peace and security in the Asia Pacific and the world at large, and to work together with the rest of the international community to combat terrorism.³⁹⁶ The 9/11 attack alerted the world to the appalling danger of terrorist fanatics armed by rogue states with insidious weapons.³⁹⁷ The 9/11 Report suggested that countering terrorism has become, beyond any doubt, the top national security priority for the US³⁹⁸ and the international community generally. The proliferation of anti-terrorism legislation across the world also supports this fact. The SC has always denounced terrorism³⁹⁹ but after 9/11, many

390 Behera, (n 336) 227.

391 Behera, (n 298).

392 Staff, 'Fact Sheet: NATO-Russia Relations' (*The White House* 28 June 2004) <<http://www.whitehouse.gov/news/releases/2004/06/20040628-3.html>> accessed 28 November 2007; NATO-Russia Council <<http://nato.mae.ro/index.php?lang=en&id=22414>> accessed 2 December 2016.

393 Staff, 'Russia stands by West in war on terror' (*BBC News* 3 October 2001) <<http://news.bbc.co.uk/2/hi/europe/1573318.stm>> accessed 28 October 2007.

394 Staff, (n 392).

395 Bakhtiyar Tuzmukhamedov, 'Russian Federation: the Pendulum of Powers and Accountability' in Charlotte Ku and Harold K Jacobson (eds) *Democratic Accountability and the Use of Force in International Law* (CUP 2003) 257, 274–275.

396 'US, China Stand Against Terrorism' (*The White House* 19 October 2001).

397 Robertson, (n 365) 510.

398 Craig A Warren, 'It Reads Like a Novel: The 9/11 Commission Report and the American Reading Public', (2007) 41 *Journal of American Studies* 533, 555–556.

399 UNSC 1267 (15 October 1999); SCR 1333 (19 December 2000) and SCR 1363 (30 July 2001).

more resolutions were passed including a declaration that Al-Qaeda is terrorist organisation.⁴⁰⁰

Keeping in view these developments and the new world order after 9/11, it is argued that presence of terrorist organisations such as the Taliban, Al-Qaeda, the Islamic State of Iraq and Syria/the Islamic State of Iraq, and the Levant (ISIS/ISIL) in and around Afghanistan/Pakistan and their proximity to the ongoing Kashmir crisis have increased nuclear security concerns in South Asia. Many believe that presence of dangerous terrorists groups in Pakistan and the absence of international cooperation with regard to nuclear weapons security in Pakistan⁴⁰¹ poses a grave danger by creating the opportunity for hostile terrorists to obtain a nuclear bomb or other weapons of mass destruction.⁴⁰² Reports also suggest that the Pakistani nuclear scientist Dr. Abdul Qadeer Khan has allegedly transferred sensitive nuclear technology and materials to rogue nations.⁴⁰³ Further, fears were generated by reports that Pakistani nuclear scientists who sympathise with extremist Al-Qaeda ideology are assisting them to start their nuclear weapons program.

It is well-known that Pakistan is home to a large number of extremist/terrorist groups that have attempted to overthrow the unstable Pakistani government and obtain physical custody of one of Islamabad's nuclear weapons.⁴⁰⁴ All of these dangerous developments have consequences for the human security in Kashmir, as well as in the rest of the world. In 2015, as per the statistical information gathered by National Consortium for the Study of Terrorism and Responses to Terrorism about of terrorist attacks which took place in 92 countries, 74% of all deaths due to these terror attacks took place in five countries

400 UNSCRs 1373 (28 September 2001); 1390 (16 January 2002); 1452 (20 December 2002); 1455 (17 January 2003); 1526 (30 January 2004); 1566 (8 October 2004); 1617 (29 July 2005); 1624 (14 September 2005); 1699 (8 August 2006); 1730 (19 December 2006) and 1735 (22 December 2006).

401 Stransky, (n 361); David E. Sanger and William J. Broad, 'U.S. Secretly Aids Pakistan in Guarding Nuclear Arms' *New York Times* (New York, 18 November 2007) <<http://www.nytimes.com/2007/11/18/washington/18nuke.html>> accessed 7 February 2017.

402 Steve Bowman, *Weapons of Mass Destruction: The Terrorist Threat* (Cong. Res. Serv. Report for Cong., RL31332, 7 March 2002) <<http://www.iwar.org.uk/news-archive/crs/9184.pdf>> accessed 4 March 2017, at 4.

403 Karen Yourish and Delano D'Souza, 'Father of Pakistani Bomb Sold Nuclear Secrets' (*Arms Control Association* 1 March 2004) <https://www.armscontrol.org/act/2004_03/Pakistan> accessed 7 February 2017.

404 Stransky, (n 361), 3.

namely, Iraq, Afghanistan, Nigeria, Syria, and Pakistan. Further, some of the most active ISIL branches were located in Afghanistan/Pakistan, Egypt, Libya, and Yemen.⁴⁰⁵ These statistics suggest that Afghanistan/Pakistan border remains very dangerous.

India has accused Pakistan of waging a proxy war in Kashmir by arming and training Islamic militants.⁴⁰⁶ As discussed in Chapter 2, in 1989 India's political repression of the Kashmiri people resulted in a mostly indigenous insurgency which erupted in an open insurrection and demanded independence from Indian occupation.⁴⁰⁷ However, during the 1990s, Pakistani-sponsored militancy was at its peak in Kashmir through groups such as *Lashkar-e-Taiba* and *Jaish-e-Muhammad*, who replaced the local insurgents.⁴⁰⁸ These groups ideologically were charged with bloodthirstiness, religious fervor, and greed and not by political self-determination for the Kashmiri Muslims. As a result they lost the support of much of the local populace.⁴⁰⁹ However they disassociated themselves from Al-Qaeda and saw themselves purely as freedom fighters. Indeed, in June 2002 Donald Rumsfeld, the US Defence Secretary, stated during a visit to the region that 'there is no evidence of Al-Qaeda in Kashmir'.⁴¹⁰ India, nonetheless, launched many counter-insurgency operations⁴¹¹ against militant groups, but the battle is clearly far from over. Their conflation of self-determination protests with insurgencies have also led to unnecessary

405 *Annex of Statistical Information Country Reports on Terrorism 2015*, National Consortium for the Study of Terrorism and Responses to Terrorism (A Department of Homeland Security Science and Technology Center of Excellence Based at the University of Maryland, June 2016. <<https://www.state.gov/documents/organization/257738.pdf>> accessed 8 February 2017.

406 W Reisman, MH Arsanjani, S Wiessner and GS Westerman, *International Law in Contemporary Perspective* (Foundation Press 2004) 94.

407 Ganguly, (n 67) 46; See generally, Turkaya Ataov, *Kashmir and Neighbours: Tale, Terror, Truce* (Ashgate Publishing 2001).

408 Ganguly, (n 67) 47; Alastair Lawson, 'World: South Asia Pakistan and the Kashmir militants' (*BBC News* 5 July 1999) <http://news.bbc.co.uk/2/hi/south_asia/386537.stm> accessed 5 January 2017.

409 Ganguly, (n 67) 47.

410 Staff, 'Rumsfeld Backs Kashmir Moves' (*BBC News*, 12 June 2002); Staff, 'Rumsfeld Sees No Evidence of Al-Qaeda in Kashmir' *Washington File*, 13 June 2002.

411 Rattan Lal Hangloo, 'Kashmiriyat: The Voice of the Past Misconstrued' in Nyla Ali Khan (ed), *The Parchment of Kashmir: History, Society and Polity* (Palgrave Macmillan 2012) 52–53.

bloodshed. During the 2016 Kashmir unrest, some reports emerged that asserted that alienated educated Kashmiri youth seem more willing to embrace militancy to secure independence for Kashmir, and that disillusionment and disappointment in the Indian government have embittered communities that have long-rejected militant actions.

The most recent Kashmir crisis started on 8 July 2016 after the Indian army killed a young Hizbul Mujahideen Commander named Burhan Wani.⁴¹² For many Kashmiri youth, Wani was a freedom fighter. The extra-judicial killing started a fresh Kashmiri *Intifada* accompanied by pro-independence rallies and stone throwing.⁴¹³ The authorities reacted violently, using armed force and firing pellet guns killing more than 85 civilians and blinding 500 youth—mainly unarmed children—and injuring over 10,000 people.⁴¹⁴ They also intercepted communications and imposed further curfews. No attempt was made by the Indian government to address the anger felt among local Kashmiris.⁴¹⁵

In Kashmir, the attempts to use militancy to achieve independence are connected to decades of repression and the betrayal of Kashmiris by the international community, which has failed to provide any civilised solution for the festering conflict over the last 70 years. Indeed, some UN member states insist that certain national liberation struggles, particularly those in Kashmir and Palestine, should not be associated with terrorism.⁴¹⁶ That said, while one can accept the legitimacy of the freedom struggle in Kashmir, that does not mean accepting that all the means being used are legitimate, or condoning atrocities committed by any side.⁴¹⁷ The glorification of militancy amongst many educated and alienated Kashmiri youth is a rather worrisome prospect as it arguably makes them vulnerable targets of extremists for recruitment purposes, and their views may also be used to justify

412 Jon Boone, 'Kashmir death toll reaches 23 in protests at killing of rebel leader' *The Guardian* (London, 11 July 2016) <<https://www.theguardian.com/world/2016/jul/11/kashmir-death-toll-23-protests-shooting-burhan-wani-independence-violence>> accessed 26 November 2016.

413 Justin Rowlatt, 'Firing at stone-throwers in Indian-administered Kashmir' (*BBC* 15 August 2016) <<http://www.bbc.com/news/magazine-37062742>> accessed 18 February 2017.

414 Waheed, (n 123); Zacharie Rabeih and Kabir Agarwal, 'Blind in Kashmir with 100 pellets lodged in his head' *Aljazeera* (Doha, 7 December 2016) <<http://www.aljazeera.com/indepth/inpictures/2016/11/blind-kashmir-100-pellets-lodged-head-161124075129498.html>> accessed 8 December 2016.

415 Aaron, (n 5).

416 P Schmid (ed), *The Routledge Handbook of Terrorism Research* (Routledge 2011) 19–27.

417 Alex P Schmid, 'The way forward on counter-terrorism: global perspectives' (2016) 2 *Strathmore Law Journal* 49, 51.

indiscriminate attacks against their communities in the name of national security.

As discussed in Chapters 1 and 2, Kashmir's geographical position has historically been considered important in terms of global security interests.⁴¹⁸ Today, it unfortunately also has geographical proximity with the terrorist-infested⁴¹⁹ border of Afghanistan where Al-Qaeda⁴²⁰ as well as ISIS⁴²¹ remains active. These extremist groups are always on the lookout to recruit vulnerable targets and they possess unparalleled abilities to transmit their extremist messages, recruit people, and control hundreds of square miles of territory.⁴²² Further, historically, Al-Qaeda is a loose network of trans-national revolutionary movements and has supporters throughout the Muslim world.⁴²³ Martin suggests that Al-Qaeda's overarching goals are:

[T]o link together Muslim extremist groups throughout the world into a loose pan-Islamic revolutionary network and to expel non-Muslim (especially Western) influences from Islamic regions and countries.⁴²⁴

Al-Qaeda was active in the Muslim majority regions of the world where the rulers, who they consider oppressors, are non-Muslim like Kosovo, Bosnia, and Chechnya.⁴²⁵ The former Yugoslav leader Slobodan Milosevic at his war crimes trial in The Hague stated that a document that he identified as a 'Congressional Statement' from the intelligence service proved the existence of Al-Qaeda support for Muslim fighters in Kosovo, Bosnia and Chechnya.⁴²⁶ The Muslim

418 Letter to Philip Baker (MP), Commonwealth Office, Whitehall SW 1, Dated 2 March 1948, in Mss Eur F189/20–24, Date: Feb–Jun 1948, Correspondence and Papers on the Kashmir Crisis [BL].

419 Kingsley de Silva, 'Terrorism and Political Agitation in Post-Colonial South Asia: Jammu-Kashmir and Sri Lanka' in RC Thakur (ed), *South Asia in the World: Problem-Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press 2004) 84, 86.

420 Brew, (n 351) 178–79.

421 Annalise Lekas, 'ISIS: The Largest Threat to World Peace Trending Now' (2015) 30 *Emory International Law Review* 313.

422 *ibid* 315.

423 Gus Martin, *Understanding Terrorism – Challenges, Perspectives and Issues* (2nd edn, Sage Publications 2006) 293.

424 *ibid* 293.

425 Staff, 'Al-Qaeda helped Kosovo rebels' (*BBC News* 8 March 2002) <<http://news.bbc.co.uk/2/low/europe/1862515.stm>> accessed 7 January 2008.

426 *ibid*.

volunteers (*Mujahideen*) who fought on behalf of Bosnians came from Afghanistan, Algeria, Tunisia, and Yemen, and were motivated by religious zeal.⁴²⁷

It appears that Al-Qaeda has intervened in the past where Muslim populations were oppressed by non-Muslims. Historically, large groups of Al-Qaeda cadets became resident in Afghanistan, Algeria, Bosnia, Chechnya, Indonesia, Iraq, Kosovo, Lebanon, Pakistan, Sudan, West Bank, France, Germany, US, Britain, and Brazil.⁴²⁸ It is argued that Al-Qaeda finds it attractive to operate in conflict-ridden areas with majority Muslim populations. In Kosovo, there was clear evidence collected by US military advisers that the groups fighting under the Kosovo Liberation Army (KLA) were financed by Al-Qaeda.⁴²⁹ Likewise, Macedonian intelligence services have also claimed that Al-Qaeda was providing support to the KLA and that its members were trained in Afghanistan.⁴³⁰ Therefore, the danger of these extremist organisations targeting alienated Kashmiri youth is worrisome and real.

Kashmiris, just like Bosnians,⁴³¹ are traditionally very secular Muslims, which is evident from their freedom struggle since 1947. For the last 70 years, generations of Kashmiri people have been scared for their lives and have experienced unprecedented Indian oppression and gross human rights violations. As discussed in Chapter 5, currently India has 700,000 Indian troops stationed in Kashmir.⁴³² Over the years, the army has been involved in committing gross human rights violations such as extrajudicial killings, disappearances, torture, rape, massacres, setting fire to residential districts, fake encounters etc. All of these human rights violations are well documented.⁴³³ However, despite these

427 Martin, (n 423) 292.

428 *ibid* 294; Kevin Lapp, 'Pressing Public Necessity: The Unconstitutionality of the Absconder Apprehension Initiative' (2005) 29 New York University Review of Law and Social Change 573, 583.

429 Michael Ruppert, *Crossing the Rubicon-The Decline of the American Empire at the end of the Age of Oil* (New Society Publishers 2004) 116.

430 Aaron Mannes, *Profiles in Terror-A Guide to Middle East Terrorist Organisations* (Rowman & Littlefield 2004) 45.

431 Martin, (n 423) 293.

432 Rebecca Knuth, *Burning Books and Leaving Libraries-Extremist Violence and Cultural Destruction* (Praeger 2006) 77; Paul R Dettman, *Indian Changes Course-Golden Jubilee to Millennium* (Praeger 2001) 127; Observer News Service, 'Would you need 700,000 troops For 250 militants: Mirwaiz to Go!' *Kashmir Observer* (Srinagar, 31 May 2016) <<https://kashmirobserver.net/2016/local-news/would-you-need-700000-troops-250-militantsmirwaiz-go-7027>> accessed 10 October 2016.

433 Grace Pelly, *State Terrorism: Torture, Extra-judicial Killings and Forced Disappearances in India* (Human Rights Law Network 2009) 132; 'Kashmir's Torture Trail', (n 9); Report of the

atrocities, Kashmiris have so far kept their struggle alive without succumbing to terrorist ideologies. This is mainly due to their native culture and secular philosophy of *Kashmiriyat*, which focuses on harmony and humanism.⁴³⁴

However, with rise of dangerous extremist ideologies at a global level, one cannot ignore the possibility of the spread of extremism into Kashmir, which is a Muslim majority territory with a population that has been waiting to exercise right to self-determination for the last 70 years. Terror organisations such as Al-Qaeda or ISIS are always in search of a new Islamic *Jihad*/conflicts and Kashmir⁴³⁵ may just become their new cause. This is a dangerous prospect and could further destabilise the internal security of the region.

For these reasons, a speedy resolution of Kashmir conflict must be a priority for the US as well as the international community. The spread of terrorism to Kashmir could be prevented by resolving the underlying Kashmir conflict, which may be exploited by terrorists, and preventing the alienation of Kashmiris by effective counter-motivation measures.⁴³⁶

International Commitment to Prevent Gross Human Rights Violations in Kashmir

International human rights norms have taken on their true character as laws rather than a set of pious platitudes.⁴³⁷ This has balanced the relationship

Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Addendum: Mission to India (UN Doc: A/HRC/23/47/Add.1), 26 April 2013, para 100; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns* (26 April 2013) <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf> accessed 15 December 2016; Staff, 'Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir' (*Human Rights Watch* 11 September 2006) vol 18, no 11(c) <<https://www.hrw.org/report/2006/09/11/everyone-lives-fear/patterns-impunity-jammu-and-kashmir>> accessed 15 October 2016; Staff, 'India: Abuse of the PSA in Jammu and Kashmir' (*Human Rights Watch* 5 April 2000); Amnesty International, AI Index ASA 20/13/00; Staff Report (Dundee), 'Kashmir 1991: Health Consequences of the Civil Unrest and the Police and Military Action' (Physicians for Human Rights (UK), 1991) 13–14; Public Commission on Human Rights, State of Human Rights in Jammu and Kashmir 1990–2005 (Hindustan Printers 2006) 124; S Kak (Director), *Jashn-i-Azadi* (Celebrating Freedom), Documentary on Kashmir, 2007.

434 Deepak Lal, 'The Status Quo in Kashmir?' in Richard N. Rosecrance and Arthur A. Stein (eds), *No More States? Globalization, National Self-Determination, and Terrorism* (Rowman & Littlefield 2006) 146.

435 Dimitris Keridis, 'Earthquakes, Diplomacy, and New Thinking in Foreign Policy' (2006) 30(1) *Fletcher Forum of World Affairs* 207, 208.

436 Schmid, (n 417) 72–73.

437 Robertson, (n 365) 518.

between traditional conceptions of sovereignty and human rights.⁴³⁸ Clearly, a state involved in human rights violations cannot rely on sovereignty to shield it from international influences, and international human rights law reflects derogation from this assumptions.⁴³⁹ Further, the role of the international community under this changed relationship is to maintain international peace and security and to prevent gross violations of human rights. The progression of international law demonstrates a commitment to protecting human rights even when it raises concerns about national sovereignty.⁴⁴⁰ The preamble to the UNC reaffirmed that human rights are the foundation of international law in the post-WWII era. After the UN was established, the commitment to human rights protection grew and many human rights conventions and bodies, such as the International Criminal Court, were put in place to address human rights and humanitarian law violations.⁴⁴¹ ICJ jurisprudence even suggests that states cannot rely on self-defence if they violate the right to self-determination and other human rights guaranteed by the International Covenant on Civil and Political Rights.⁴⁴²

However, the sad reality is that states, from time to time, have used guerrilla armies and terrorist groups as proxies to weaken their adversaries or distant enemies. The US (in Nicaragua and Afghanistan),⁴⁴³ Pakistan (in Afghanistan and Kashmir), India (in Baluchistan), Iran (in the Syria-supporting Alawite regime in Damascus)⁴⁴⁴ etc., are among the states that have trained and financed guerrillas.⁴⁴⁵

438 Mills, (n 326) 267.

439 Henkin, (n 326) 32.

440 See 'From Nuremberg To Hague: The Road To The International Criminal Court' (Nuremberg Human Rights Centre, Federal Foreign Office, Goethe Institute, 2006) <www.iccnw.org/documents/FromNurembergtoHague_07july_eng.pdf> accessed 7 February 2017.

441 See generally, Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015).

442 See *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 883, 127 & 136 (July 9). The Court held that Israel could not rely on the right of self-defence to justify usurping the Palestinian's right to self-determination within occupied Palestinian territory or their liberty of movement guaranteed by the International Covenant on Civil and Political Rights.

443 Reed Brody, *Contra terror in Nicaragua: Report of a fact-finding mission: September 1984–January 1985* (South End Press, 1985) 12; The US government sponsored Nicaraguan 'Contras' to destabilise the Sandinista Government which they believe are allied with Cuba and the USSR.

444 Schmid, (n 417) 63.

445 *ibid* 62; T. Ataov, *Kashmir and neighbours: Tale, terror, Truce*, (Ashgate Publishing 2001) 205.

A state's rationale for supporting non-state armed actors might sometimes have a humanitarian basis, but more often such support is provided to protect their own national interests/borders. States that use such non-state armed groups impose no normative human rights standards on them in return for the state's financial support.⁴⁴⁶ Many of these state-sponsored and trained armed groups, including the Taliban and Al-Qaeda, have developed into terrorist organisations, which their creators are now fighting. Many argue that the rise of Al-Qaeda and the Taliban occurred due to the American policy in Afghanistan⁴⁴⁷ to arm the Afghan resistance against the Soviet invasion.⁴⁴⁸ The Taliban has been involved in committing many human rights violations in Afghanistan including forced deportations, massacres, torture, extrajudicial executions, and enforced disappearances.⁴⁴⁹ They have never been held criminally accountable for their crimes, which include the September 11 attacks.⁴⁵⁰

The overall human rights situation has worsened in the post 9/11 world as many states, such as India, have started to brand legitimate self-determination movements as terrorism. Part of the problem is that within international law, there is no commonly agreed upon or universally accepted legal definition of terrorism.⁴⁵¹ Hence, India and other states are free to define and use labels like terrorism, extremism, and separatism on the domestic front in ways that please them and support their internal policy. States can use allegations of terrorism to discredit a broad range of activities, from street protests to claims for a people's right to self-determination,⁴⁵² further curtailing human rights

446 Schmid, (n 417) 63.

447 Michael Rubin, 'Who Is Responsible for the Taliban?' (*The Washington Institute* March 2002) <<http://www.washingtoninstitute.org/policy-analysis/view/who-is-responsible-for-the-taliban>> accessed 9 February 2017.

448 Alan J Kuperman, 'The Stinger missile and U.S. intervention in Afghanistan' (1999) 114 *Political Science Quarterly* 219.

449 Ossai Miazad, 'Transitional Justice in Post-war Afghanistan' (2002) 9 *Human Rights Brief* 2, 2–6.

450 Drumbl, (n 389) 76.

451 See, the UN Ad Hoc Committee on Terrorism, established by General Assembly resolution 51/210 of 17 December 1996. Since 1997, the UN Ad Hoc Committee has been discussing the proposed treaty namely, Comprehensive Convention against International Terrorism (1997) but so far there is a deadlock on the definition of terrorism that could be accepted by all the Member States of the UN General Assembly. Also see Robert A Friedlander, 'Terrorism And Self-Determination: The Fatal Nexus' (1979–1980) 7 *Syracuse Journal of International Law and Commerce* 263, 264–66.

452 Schmid, (n 417) 51–52.

protection within their jurisdictions. This trend is victimising ordinary civilians, who are now targeted by state terrorism as well as the terrorist acts of non-state armed groups.

To delegitimise Kashmiris' self-determination movement, the government of India is strongly associating Kashmiris historical national liberation struggle, which started in 1947, with the recent phenomenon of terrorism. Many rightly argue that it is unacceptable⁴⁵³ and is a precursor of further human rights violations. To avoid international scrutiny, India is using the banner of the war against terrorism to cover their use of lethal force against unarmed civilians, human rights activists, academics, and anyone who questions the legitimacy of the Indian claim over Kashmir.⁴⁵⁴ During the 2016 Kashmir unrest, which led to many deaths and the blinding of hundreds of people through the use of pellet guns by the Indian security forces,⁴⁵⁵ Pakistani Prime Minister Nawaz Sharif called on the UN General Assembly in New York for an independent UN inquiry into extrajudicial killings in Kashmir. The Indian delegation deflected the issue by labelling Pakistan a 'terrorist state'.⁴⁵⁶ Clearly, no democratic state should be allowed to resist investigations into human rights violations, particularly when those violations are of the core ethical and normative values of humanity.

The Indian forces in Kashmir are involved in systematic acts of aggression and violations of human rights.⁴⁵⁷ The US State Department, in their report on India, affirmed that 'extra-judicial killings by government forces (including deaths in custody and faked encounter killings) continued to occur

453 Schmid, (n 417) 19–27.

454 Staff, 'Kashmiris demand for self determination is not terrorism: Sartaj Aziz' (Associated Press of Pakistan, 20 July 2016) <<https://www.app.com.pk/kashmiris-demand-for-self-determination-is-not-terrorism-sartaj-aziz/>> accessed 18 February 2017; see generally, Tariq Osman Hyder, 'Kashmir: Self-Determination versus State Terrorism' (2001) 14 Korean Journal of Defence Analysis 141.

455 Azad Essa, 'The doctors treating Kashmiris blinded by pellets' (*AlJazeera* 16 October 2016) <<http://www.aljazeera.com/indepth/features/2016/09/doctors-treating-kashmiris-blinded-pellets-160927053126837.html>> accessed 18 February 2017.

456 Rishi Iyengar, 'India and Pakistan's Verbal Battle Over the Kashmir Attack Goes to the U.N.' (*Time* 22 September 2016) <<http://time.com/4503748/india-pakistan-kashmir-un/>> accessed 10 December 2016.

457 Channel 4, *The Killing of Kashmir; Unreported world*, documentary, 8 April 2004; JF Burns, 'Rebels in Kashmir and Indian Army Ready for Long Fight', *The New York Times* (New York, 16 May 1994) A6.

frequently in the State of Jammu and Kashmir'.⁴⁵⁸ It is reported that 2.05 million Kashmiris have been forced to flee from their homes since 1989.⁴⁵⁹ A report by the United Nations High Commissioner for Refugees suggests that since 1989, the total number of displaced Kashmiris in India alone is 350,000.⁴⁶⁰ The 2016 Kashmir unrest threatened a displacement of a further half a million people.⁴⁶¹

Draconian laws like the Jammu and Kashmir Public Safety Act (JKPSA) 1978 and Armed Forces (Jammu & Kashmir) Special Powers Act (AFSPA) 1990⁴⁶² further entrench the widespread violations of rights by reducing even the façade of a possibility of redress. Civilians are indiscriminately arrested under the JKPSA and the AFSPA. Further, the AFSPA gives security forces the power to shoot and kill.⁴⁶³ No prosecutions can be brought against those who claim to be acting under such powers with the consent of the central government. Such practices show that constitutional rights and remedies, including *Habeas Corpus* – the right to life and due process – ⁴⁶⁴ are subservient to the state's power to curtail individual liberty.⁴⁶⁵ This also shows the duplicity of Indian claims about democracy, as well as their reliance on security laws in Kashmir and their avoidance of resolving a problem which is essentially political in nature.⁴⁶⁶

Over the years, the international community has tolerated these brutal policies of repression in Kashmir despite such behaviour being unacceptable

458 US Department of State, 'India, Country Reports on Human Rights Practices- 2000, South Asia', released by the Bureau of Democracy, Human Rights and Labor, 23 February 2001.

459 Public Commission on Human Rights, (n 433) 38.

460 Quoted in Cabeiri de Bergh, 'Refugees, political Subjectivity and the Morality of Violence- From Hijrat to Jihad in Azad Kashmir' (PhD thesis, Faculty of Graduate School, Cornell University 2005) 126; Patricia Ellis and Zafar Khan, 'Kashmiri Displacement and the Impact on Kashmiriyat' (2003) 12 *Contemporary South Asia* 523, 523.

461 Staff, 'Kashmir: Shelling forces thousands to flee their homes' (*Al Jazeera* 15 November 2016) <<http://www.aljazeera.com/news/2016/11/kashmir-shelling-forces-thousands-flee-homes-161115130914863.html>> accessed 10 December 2016.

462 The Armed Forces (Special Powers) Act 1958 was extended to Kashmir in 1990 and came into force on 5 July 1990.

463 The Armed Forces Special Powers Act, 1990.

464 Ashok Agrawal, *In Search of Vanished Blood: The Writ of Habeas Corpus in Jammu and Kashmir: 1990–2004* (SAFHR Paper Series 17, Kathmandu 2008).

465 Nitya Ramakrishnan, (n 9) 20.

466 *ibid.*

according to all international human rights standards. During a similar humanitarian crisis in Kosovo and in the context of NATO actions to address the situation, President Bill Clinton said: 'Make no mistake; if we and our allies do not have the will to act, there will be more massacres. In dealing with aggressors...hesitation is a license to kill. But action and resolve can stop armies and save lives'.⁴⁶⁷ Clinton called the action in Kosovo a moral duty and declared that NATO's air campaign 'a just and necessary war'.⁴⁶⁸ The British Prime Minister, Tony Blair, said that NATO 'must be willing to right wrongs and prosecute just causes'.⁴⁶⁹

In 1993, a US Central Intelligence Agency study concluded that the disputed borders of Jammu and Kashmir had been the scene of almost daily skirmishes between Indian and Pakistani forces for the last half-century.⁴⁷⁰ This militarisation in Kashmir, apart from violating the human rights of the people, has escalated the spread of violence in the region, which is a threat to international peace.

Further, branding legitimate independence movements as terrorist insurgencies affects the peacekeeping operations around the world. For instance, India declined to participate in the East Timor mission, which they believe was related to ethnic separatism⁴⁷¹ and could resonate at home, particularly in relation to the Kashmir conflict.⁴⁷² 'Delhi is apprehensive of internationalising the Kashmir issue, largely due to historical resentment towards outside interference in the region and because it is critical to national security'.⁴⁷³

For these reasons, the international community must take active steps in resolving the Kashmir question. Efforts must be made to persuade India to conform to its legal commitments under the UN SCRs on Kashmir and under

467 'The President's News Conference' (1999) 35 WKLY. COMP. PRES. DOCC. 471, 25–26.

468 William Jefferson Clinton, 'A Just and Necessary War' *New York Times* (New York, 23 May 1999) 17.

469 Staff, 'Tony Blair, A Military Alliance, and More' *New York Times* (New York, 24 April 1999) A19.

470 Eric S Margolis, *War at the Top of the World-The Struggle for Afghanistan, Kashmir and Tibet* (Taylor & Francis 2002) IX, X.

471 See generally, Maya Chadda, *Ethnicity, Security, and Separatism in India* (Columbia University Press 1997).

472 Garima Mohan and Olivia Gippner, 'Chinese and Indian Approaches to United Nations Peacekeeping: A Theoretical Appraisal of Contribution Patterns and Decision-Making Structures' (2015) 7(1) *Contemporary Readings in Law and Social Justice* 83, 103.

473 Amaia Sanchez-Cacicedo, 'Peace-building in Asia: Refutation or Cautious Engagement?' 155 *Occasional Papers* No 86, 2010, 35.

human rights conventions, and to bring an end to human rights violations in Kashmir.

Conclusion

This chapter, drawing on a wide range of materials, demonstrates that the international community's position on Kashmir has become a victim of their divergent foreign policies, which have sometimes been bent towards achieving state interests. However, as discussed, the international community's legal position on Kashmir has been formulated by their unilateral acts and, under the international law principle of estoppel, they are binding.⁴⁷⁴ The UN SCRs on Kashmir calling for the conduct of plebiscite have created primary declaration whereby states are obliged to maintain a specific pattern of conduct based on their expressed intention, as such creating a new legal relationship.⁴⁷⁵ Clearly, the international community has given the Kashmiri people a legitimate expectation that plebiscite will be conducted and, hence, they are bound not to disappoint this expectation. India's stated intention to conduct a plebiscite and the international community's undertaking to facilitate it hence confer on the expressed declarations the character of a legal undertaking, which states are legally required to follow as 'an undertaking of this kind, if given publicly, and with an intent to be bound ... is binding'.⁴⁷⁶ The element of publicity⁴⁷⁷ is a defining element of a unilateral act, as the ICJ indicated in its 1974 decisions in the *Nuclear Tests* cases.⁴⁷⁸

The foregoing analysis of the legal position of the international community, including that of India and Pakistan, has made it clear that states have

474 Emmanuel Voyiakis, 'Estoppel' (*Oxford Bibliographies* 23 March 2012) <<http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0058.xml>> accessed 13 February 2017.

475 *Yearbook of the International Law Commission*, 1998, vol II (pt 1) 334, para 131. Document A/CN.4/486; Unilateral Acts of States, DOCUMENT A/CN.4/500 and Add.1 (Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur) 14 April and 10 May 1999, paras 13–14.

476 *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Rep 253, 267, para 43.

477 Unilateral Acts Of States, DOCUMENT A/CN.4/500 and Add.1 (Second report on unilateral acts of States, by Mr. Víctor Rodríguez Cedeño, Special Rapporteur) 14 April and 10 May 1999, para 55.

478 *Nuclear Tests (Australia v France)* (Judgment) (1974) ICJ Rep 253, 267, para 43; *Nuclear Tests (New Zealand v France)* (Judgment) (1974) ICJ.Rep 457, 472, para 46.

tied themselves to a legal view that they legally cannot abandon. The expressed intention of international community in the accepted UN SCRs on Kashmir,⁴⁷⁹ as well as in their unilateral declarations, obliges them to adhere to their publicly expressed intention that the Kashmiri people should exercise self-determination through the conduct of a plebiscite after demilitarisation of the region is complete. Further, India, under the rule of estoppel within international law, is barred from changing its previous representation, particularly as it has already been relied upon.

It was discussed that the international community has in recent times assumed a rigid policy of promoting bilateralism as the way to solve the seven-decades-old Kashmir question. This focus on bilateralism has caused the international community to fall prey to the tactics India has employed to prevent third party intervention.⁴⁸⁰ Indian foreign policy has therefore successfully frustrated the international community's efforts to solve the Kashmir question under the UN SCRs on Kashmir. It has flagrantly refused to conduct the promised plebiscite for decades despite calling itself as the 'world's largest democracy'.⁴⁸¹ It has also started instigating conflicts related to the China-Pakistan Economic Corridor with China by campaigning globally to label Pakistan a 'rogue terrorist state'. In return, Pakistan has been framing the Kashmir conflict as a 'trans-border insurgency' against India as well as training and financing terrorist organisations in Pakistan-Occupied Kashmir like Lashkar-e-Taiba which is aimed at overthrowing Indian occupation in Kashmir.⁴⁸²

Political analysts believe that New Delhi's harsh language is not merely reactionary rhetoric towards Pakistan, but instead carries broader significance for Russia and China. There are even claims that India is signalling to others to abandon their bilateral and strategic relationships with Pakistan.⁴⁸³ India

479 SCR 47 (21 April 1948), 80 (14 March 1950), 91 (30 March 1951), 96 (10 November 1951), 98 (23 December 1952), 122 (24 January 1957), UNCIP SCR of 13 August 1948 & UNCIP SCR of 5 January 1949; Misra, (n 43).

480 MAA Khan, 'India Bars OIC Team to Kashmir', *Middle East News Network*, 29 November 1991; Khan, (n 32) 499 fn 18.

481 Andrew Korybko, 'Here's What The Uri Attack In Kashmir Has To Do With Russia And China' (*Katehon* 20 September 2016) <<http://katehon.com/article/heres-what-uri-attack-kashmir-has-do-russia-and-china>> accessed 2 February 2017.

482 Praveen Swami *India, Pakistan and the Secret Jihad: The Covert War in Kashmir, 1947–2004* (Routledge 2006).

483 Korybko (n 481).

herself signed a Logistics Support Agreement with the US,⁴⁸⁴ which practically opened all Indian military facilities for American use,⁴⁸⁵ and seeks to counter the growing maritime assertiveness of China.⁴⁸⁶ The Indian-US military-strategic partnership carried out the provocative drills in Uttarakhand state, which is located very close by the Chinese border.⁴⁸⁷ This was followed by Russia taking reciprocal steps and conducting joint military drills with Islamabad.⁴⁸⁸ These strategic military tactics by India and Pakistan have hindered the prospect of the two sides reaching a settlement on the Kashmir conflict.

It is believed that India's exacerbation of the Kashmir conflict, despite provocation from Pakistan, will affect India's rise, economic growth, and diplomatic influence in the region due to their failure to fulfil its international commitment with regards to the Kashmir question. Furthermore, India's and Pakistan's intransigence on the Kashmir questions and their insistence on maintaining the *status quo*⁴⁸⁹ is dangerous and constitutes a continuing threat to regional and international peace and security.

The discourse in this chapter establishes that today the dangers of the *status quo* have far-reaching consequences and could include an escalation to nuclear warfare, the spread of terrorism, and the continuation of the persistent violations of fundamental human rights of the Kashmiri people. All of these factors directly or indirectly could damage the greater foreign policy objectives and interests of the international community. It must be understood that the Kashmir conflict is not merely an Indo-Pakistani contest but rather a serious human security issue, which in light of rising dangers in the region are becoming a threat to global peace. Clearly, scholars such as Ganguly who believe that India's increasing military might⁴⁹⁰ over Pakistan will mean the world will care

484 Yeganeh Torbati and Idrees Ali, 'U.S., India sign military logistics agreement' (*Reuters* 30 August 2016) <<http://www.reuters.com/article/us-india-usa-military-idUSKCN114241>> accessed 2 February 2017.

485 Korybko, (n 481).

486 Sushant Singh, 'India, US sign key defence pact to use each other's bases for repair, supplies' *Indian Express* (Noida, 31 August 2016) <<http://indianexpress.com/article/india/india-news-india/manohar-parrikar-signs-key-logistics-defence-pact-with-us-3004581/>> accessed 2 February 2017.

487 Korybko, (n 481).

488 News Desk, (n 204).

489 SCR 774 (26 August, 1992), para 10; 902 (1994), para 1; 1203 (1998).

490 Ganguly, (n 67) 55.

less about the Kashmir issue are wrong. Surprisingly Ganguly remains confident that India's *'growing prosperity will enable it to more easily bear the costs of maintaining a substantial military presence in the region'* and that *'since the end of the Cold War, much of the world has lost interest in Pakistan's idee fixe about Kashmir. As India's markets beckon, its trade expands, and its military might grows, the world will care even less.'*⁴⁹¹ However, in terms of US interests in the region, any war between India and Pakistan would be a distraction from pursuing the final defeat of Al-Qaeda in the Pakistan-Afghanistan region, as well as ISIS/ISIL.⁴⁹² Clearly, encouraging both India and Pakistan to end the Kashmir conflict will bring peace on the subcontinent which is a huge potential reward well worth the effort. The international community needs to rebalance their foreign policy practices, keeping in mind the impending dangers involved in the region. States therefore have a primary responsibility to align their foreign policy with their legal position. The UN must come to see that the legal position held under the various prior SCRs needs to be realised, as the dangerous political situation in Kashmir must be resolved to protect peace in the region.

491 *ibid* 55.

492 Brew, (n 351) 205; See generally, Lekas, (n 421).

PART 3

Towards a Normative Framework



Some Conclusions

The overall aim of this book is to reappraise the 70-year-old unresolved Kashmir question from the perspective of international law. In the preceding chapters, there are in-depth discussions on key issues such as the historical statehood of Kashmir and its occupation; the substantive law on statehood, restoration of historical title, illegal occupation, state identity, continuity and recognition,¹ and self-determination through decolonisation; the presence of the unrepresentative Pro-Indian Government and human rights violations;² and the international community's legal commitments in relation to the Kashmir question. The previous chapters explained why states' foreign policy should change from accepting the *status quo* to aligning their actions to the accepted legal position.

This study demonstrates that Kashmir was a functional historical state under *Dogra* rule for a hundred years long before India and Pakistan came into existence after the partition of the British India in 1947. It was discussed in detail in Chapters 2 and 4 that Kashmir had a well-defined territory, a consolidated legal system, and the capacity to enter into international treaties.³ It became apparent that the people of Kashmir share a distinct common culture of *Kashmiriyat*, which is based on respect for the diversity of religions and languages. The Kashmiri culture is distinct from Indian and Pakistani cultures in all respects: folklore, dress, traditions, and cuisine. Its cultural heritage contains a vast array of distinctive artistic traditions.⁴ This was part of its historical development: its cultural heritage includes Hindu, Buddhist, and Islamic faiths and influences from Greece, China, Iran and other nations.⁵ Its homogeneity comes from the blend of these philosophies, with indigenous saints embodying this spirit of love with strong Sufi and Hindu influences.⁶ Buddhism was

1 Igor Grazin, 'The International Recognition of National Rights: The Baltic States' Case' (1991) 66 *Notre Dame Law Review* 1385, 1385.

2 Sumantra Bose, *The Challenge in Kashmir – Democracy, Self-Determination and a Just Peace* (Sage Publications 1997) 32.

3 Such as the Treaty of Amritsar 1846. Charles Umpherston Aitchison, *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries* (Foreign Office Press 1909), vol 11, 165–66; Jyoti Bhusan Das Gupta, *Jammu and Kashmir* (Martinus Nijhoff, the Hague, 1968) 17, 23.

4 See generally, Kaumudi, *Kashmir: Its Cultural Heritage* (Gulshan Books 2005).

5 *ibid* 12–13.

6 *ibid* 26.

introduced to Kashmir by Asoka in 250 BC, and this coexisted for a period with the *Shaivite* Hinduism in the Valley.⁷ Later rulers, such as Zain-ul-Abidin,⁸ were also notable for their attempts to foster greater unity. Mystic saints and poets embody this rich history, giving Kashmir a distinctively beautiful literary culture.

This work demonstrates that the people of Kashmir make their 'nation' a 'state'. The people of Kashmir, through their mental continuity and common identity of *Kashmiriyat*, have kept their nation alive.⁹ As discussed, the issues relating to Kashmir's statehood bear a resemblance with the Baltic States, which reverted¹⁰ to their pre-occupation sovereignty after independence. This determination among the people to retain their identity is key to their unity. Some occupied territories relinquish their entitlement to restore their historical title, like the Princely State of Hyderabad did by submitting to Indian occupation.¹¹ In the context of the differing experiences and choices made in other occupied territories, it was submitted that Kashmir is not just the 'undecided partition' issue between India and Pakistan but rather a case of illegal occupation where people are waiting to exercise their right to self-determination to restore their historical title. Furthermore, since 1947 Kashmiris have consistently pushed for independence from both India and Pakistan.¹²

The expanded analysis of these substantive law principles, as well as the specific territorial situation of Kashmir, demonstrates that for illegal occupation cases these international laws operate in a harmonising fashion, allowing

7 ibid 20. Asoka's philosophy of statehood is summarised by Romila Thapar as follows: 'The policy of Dharma was a policy rather of social responsibility than merely of demanding that the entire population should favour Buddhism. It was the building up of an attitude of mind in which social behaviour, the behaviour of one person towards another, was considered of great importance. It was a plea for the recognition of the dignity of man, and for a humanistic spirit in the activities of society.' See Romila Thapar, *Asoka and the Decline of the Mauryas* (OUP 1997) 3.

8 Kaumudi, (n 4) 24.

9 For the definition of the reversion see, CN Alexandrowicz, 'New and Original States: The Issue of Reversion to Sovereignty' (1969) 45 *International Affairs* 474.

10 Rein Müllerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (Routledge 1994) 145.

11 Keeping in view the forceful annexation of Hyderabad by India, its claim to Kashmir on the basis of secularism appeared a farcical political philosophy. LP Sen, *Slender was the Threat: Kashmir Confrontation 1947-48* (Orient Longman, Bombay, 1969) 10.

12 Prem Shankar Jha, 'The Rise of Kashmir's Second "Intifada"' *The Wire* (New Delhi, 23 August 2016) <<http://thewire.in/61048/kashmir-uprising/>> accessed 2 December 2016.

occupied people to decide the future of their territory through the exercise of their right to self-determination.¹³ For instance, the state continuity and *de facto* resurrection of the Baltic States after their occupation by the Soviet Union was realised through the exercise of the right to self-determination.¹⁴ It mainly becomes possible because occupied 'people'¹⁵ share a distinctive historical connection with their 'territory'.¹⁶ The right to self-determination becomes merely an apparatus for such people to restore their historical title,¹⁷ which is also recognized by others states and is 'complimented by political and legal arguments'.¹⁸ It was demonstrated that the two self-reliant principles of the right to self-determination and the restoration of historical title can both boost the independence option for the occupied people of Kashmir, who have

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- 13 Peter Van Elsuwege, 'State Continuity and its Consequences: The Case of the Baltic States' (2003) 16 (2) *Leiden Journal of International Law* 377, 381; Lauri Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law* (Martinus Nijhoff 2003); Lauri Mälksoo, 'Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in the International Law' (2000) 69 *Nordic Journal of International Law* 289, 309; Grazin, (n 1); Eyal Benvenisti, *The International Law of Occupation* (Princeton University Press 1993); Lawrence S Eastwood, 'Secession: State Practice and International Law after the Dissolution of the Soviet Union and Yugoslavia' (1993) 3 *Duke Journal of Comparative and International Law* 299, 316; Krystyna Marek, *Identity and Continuity of States in Public international Law* (2nd edn, Librairie Droz 1968); Joshua Castellino and Jeremie Gilbert, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 *Macquarie Law Journal* 155, 157; Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241, 245; Paul H Brietzke, 'Self-Determination, or Jurisprudential Confusion: Exacerbating Political Conflict' (1995–96) 14 *Wisconsin International Law Journal* 69, 96.
 - 14 William CV Allison, 'Self-Determination and Recent Developments in the Baltic States' (1990–91) 19 *Denver Journal of International Law and Policy* 625, 625; Graham Smith, 'The Resurgence of Nationalism' in Graham Smith (ed), *The Baltic States: The National Self-determination of Estonia, Latvia and Lithuania* (St Martin's Press 1994) 136.
 - 15 UNGA Res 217 A (III) (1948) UN doc A/810 at. 71; UNGA Res 1514 (XV) (14 Dec. 1960); Antonio Cassese, *Self-Determination of Peoples-A Legal Reappraisal* (CUP 1995).
 - 16 *Western Sahara*, Advisory Opinion, ICJ Rep, 1975, 12.
 - 17 Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR A Study of the Tension between Normatively and Power in International Law*, (n 13); Lauri Mälksoo, 'Professor Uluots, the Estonian Government in Exile and the Continuity of the Republic of Estonia in the International Law', (n 13) 309; Grazin, (n 1); Benvenisti, (n 13); Eastwood, (n 13) 316; Marek, (n 13).
 - 18 Grazin, (n 1) 1418.

kept their communal continuity¹⁹ alive for the last 70-years, despite Indian aggression and alien occupation since 1947.

In the previous chapters it was shown that international law, following the well-defined principle of *ex injuria ius non oritur*, accepts that illegality neither creates international law nor bestows valid legal title to the occupier over the occupied territory. Clearly, this principle applies to the situation in Kashmir as much as it did to the Baltic States, and provides the legal basis for the continued existence of Kashmir as a state after its occupation by India and Pakistan.²⁰ On the basis of the illegal annexation, Kashmir is entitled to resurrect its 'identity without continuity' based on the Roman law principle of *postliminium*.²¹ As such, the identity of the State of Kashmir was not destroyed after occupation but its state continuity was frozen in time, and it could be revived as soon as the people of Kashmir exercise their right to self-determination. In that respect, Kashmir's statehood can be allegorically compared to the story of

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- 19 Steny H. Hoyer, 'Implementation of the Helsinki Accords: Baltic Leadership on Status of Independence Movements – Appendix, Democracy under Siege' [1990–1991] 17 Series 3 Basket 111 Hearings before the U.S. on Security and Cooperation in Europe and Other Congressional Hearings Reports and Prints 33, 34.
 - 20 Although Pakistan has not constitutionally incorporated POK within its federation, it has illegally occupied part of Kashmir and people in Northern Kashmir and POK are equally entitled to exercising their right to self-determination. Fakiha Khan, 'Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute' (2000–2001) 29 Georgia Journal of International & Comparative Law 361, 364; Shamil Shams, 'How free is Pakistan-administered Kashmir?' (DW Made for Minds, 21 July 2016) <<http://www.dw.com/en/how-free-is-pakistan-administered-kashmir/a-19416247/>> accessed 19 March 2017; Praveen Swami, *India, Pakistan and the Secret Jihad: The Covert War in Kashmir, 1947–2004* (Routledge 2006); Jha, (n 12); Sarla Handoo, 'Elections in POK – a farce' (*The Kashmir Herald*, undated) <<http://www.kashmirherald.com/main.php?t=OP&st=D&no=163>> accessed 28 February 2017; Jacob Steiner, 'The Untold Story of the People of Azad Kashmir by Christopher Snedden: a Review' (Dawn, 4 August 2013) <<https://www.dawn.com/news/1033395>> accessed 28 February 2017.
 - 21 Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of Baltic States by the USSR: A Study of the Tension between Normativity and Power in International Law* (n 13), 19–20; 'Where, however, a nation which has been conquered by another, throws off the yoke before it has been permanently fastened by prescription, then, by what is called *postliminium*, the nation thus reasserting its independence is entitled to resume its old national place'. Francis Warten, *Francis Wharton Commentaries on Law Embracing on the Nature the Source and the History of Law on Law Public and Private and on Constitutional and Law* 184 (1844) 232. [By 1947, there was no way for illegal occupation to 'permanently fasten by prescription'].

Sleeping Beauty, and its statehood could be reawakened as soon as its people exercise their right to self-determination.

However, the political and legal limitations associated with the application of the right to self-determination are also discussed, mainly because this principle is mired in the conflict between territorial entitlement and the inviolability of borders. In general, this conceptual ambiguity about exercise of the right to self-determination in a legal manner has become a way for states to exploit the situation, which eventually results in bloodshed and violent territorial conflicts, such as in Kosovo, East-Timor, and Kashmir.

These limitations are compounded in the cases of Indian Native States and abandoned colonies, which were not *de jure* recognised as states within international law. They were classified in a somewhat confusing manner and²² described as protectorates, protected states, or suzerain states, which created contention about their sovereignty.²³ As discussed, further misperception prevails since the meaning of suzerainty in relation to protectorates is unclear,²⁴ as some authors believe that they did not possess any international capacity.²⁵

However, although ambiguity existed over the statehood of Kashmir, the philosophical foundations underpinning the concept of statehood show Kashmir to have been a state. As discussed, Kierkegaard's philosophy of existentialism helps to explain the subjective existence²⁶ of Kashmir after its extinction. Gong's 'standard of civilisation'²⁷ adds further momentum to this view by explaining that non-European states were considered inferior unless they could conform to European values. Furthermore, Anghie maintains that

22 William Digby, *Condemned Unheard: The Government of India and H.H. the Maharaja of Kashmir* (Indian Political Agency 1890) 8; Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights and the History of Kashmir* (Hurst & Company, London 2004) 11.

23 See, for example, Paras Diwan, 'Kashmir and the Indian Union: The Legal Position' (1953) 2 *International and Comparative Law Quarterly* 333, 334; Shakti Kak, 'The Agrarian System of the Princely State Jammu and Kashmir' in Waltraud Ernst and Biswamoy Pati (eds), *India's Princely States: People, Princes and Colonialism* (Routledge 2007) 68.

24 James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon Press 2006) 321.

25 William Edward Hall, *A Treatise on International Law* (3rd edn, Clarendon Press 1890) 31; Koskenniemi, (n 13) 246.

26 Rebecca Rabkin, 'From Kierkegaard to Kennedy: Existentialist Philosophy in the Supreme Court's Decision in *Planned Parenthood v. Casey* and its Effect on the Right to Privacy' (2004) 31 *Hastings Constitutional Law Quarterly* 611, 629. Also see the discussion in Chapter 3.

27 Gerrit W Gong, *The Standard of Civilization in International Society* (Clarendon Press 1984) 8.

the sovereignty of the non-European states was subjected to a European conceptual framework²⁸ that was alien to them. This background over the concept of sovereignty assists in explaining the subjective statehood of Kashmir.

These views help us to understand the confusion that surrounded the statehood of Kashmir and suggests that it was perhaps the result of a 'clash of civilisations' rather than the non-existence of Kashmir as a state. The powerful European states that created international law considered Europe to be the centre of the world and focused on the doctrine of state recognition as an integral part of sovereignty. The international community has supported its people's right to self-determination through a plebiscite, which shows appreciation for the separate status that Kashmir maintained in the past. Additionally, non-recognition would not make Kashmir a non-existent entity; it was governed by a ruler who had effective authority over the territory and the people. It is clear that under the British Crown, Kashmir was a *de facto* independent entity. As discussed, the peculiar protectorate arrangement between Kashmir and Britain showed an acknowledgement of this status. Kashmir, as a buffer state, was of strategic importance and a safety zone for the British Empire.²⁹ This fact explains Kashmir's superior level of sovereignty in comparison to the other Princely States.

In Chapter 2, it was demonstrated that the Princely States were generally in support of British imperial rule³⁰ in the Indian subcontinent. This influenced the British when they were forming their policies on decolonisation and the degree of sovereignty that the Princely States would have in the post-1947 setting. Britain decided to let paramountcy lapse over the Princely States and offer them the authority to decide whether they would stay independent or accede to India or Pakistan. Given this framework, there was no constitutional authority that could have forced the Princely States to accede to any dominions against their free will.³¹ Kashmir, after the lapse of paramountcy, did not join any of the dominions and instead became completely independent. The Cabinet Mission Memorandum 1946³² and the Indian Independence Act (IIA) 1947³³ affirm this position, as do the statements of senior British officials

28 Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-century International Law' (1999) 40 *Harvard International Law Journal* 1, 68.

29 Kaumudi, (n 4) 54.

30 Fiona Groenhout, 'The History of the Indian Princes: Bringing the Puppets Back onto Centre Stage' (2006) 4 *History Compass* 629, 629.

31 Crawford, (n 24) 211.

32 FO 371/84244: Validity of Kashmir's accession to India, 1950 [NAL].

33 The Indian Independence Act 1947, Section 7.

including Prime Minister Attlee³⁴ and Lord Mountbatten, the latter in his Crown Representative Address.³⁵ Clearly, the British Crown accepted that the Indian Native States were free to accede to India or Pakistan or remain independent. In 1947, the Princely State of Kashmir, after not acceding to India or Pakistan, was fully independent.³⁶

Even from the perspective of international law, under the Montevideo Convention 1933, Kashmir became a state by 1947 as it had a permanent population, a defined territory, a government, and the capacity to enter into relations with the other states. In terms of Article 3 of the Montevideo Convention, Kashmir existed as a state in the political sense even if it was not recognised by other states, and was therefore entitled to defend its integrity and independence.

Furthermore, the archival evidence of Kashmir's statehood can be clearly found in Document 1931,³⁷ the crucial aspects of which were discussed in Chapter 4. This key document clearly established that Kashmir was a protectorate under Section 9 of the Treaty of Amritsar (TOA). Cases such as *The Queen v. Jameson & Others*,³⁸ *Mighell v. Sultan of Johur*,³⁹ and *Duff Development Co v. Kelantan*⁴⁰ help to affirm that Kashmir's relationship with Britain was *not merely of suzerainty* but that of *alliance* due to the existence of the TOA. Document 1931 sheds light on the confusion that surrounded the sovereignty of Kashmir. It also shows that the British Government was inclined to accept Kashmir as a sovereign state even before their paramountcy lapsed. This was not the case with the other Princely States. This special treatment could be attributed to the fact that Kashmir, in the Himalayan Mountains, acted as a buffer⁴¹ state between the USSR and British India and thereby had a distinct status and position amongst all the Indian Native States.

However, the State of Jammu & Kashmir became *de facto* extinct after the Maharaja of Kashmir was forced to sign an instrument of accession to India, though that was conditional to a plebiscite. As the history reveals, the forced accession was facilitated by the illegal use of military force by India to occupy the territory.⁴² This resulted in a war between India and Pakistan, dividing the

34 HCPP, Paper No. 7047, 20th Century House of Commons Sessional Papers, Session 1946–47, Para 12.

35 FO 371/84244: Validity of Kashmir's accession to India, 1950 [NAL].

36 Crawford, (n 24) 321–23.

37 File No 498-P 1931, 1 [NAL].

38 (1896) 2 Q.B 425.

39 (1894) 1 Q. B 149.

40 (1924) A.C. 797.

41 Digby, (n 22) 8.

42 Alastair Lamb, *Birth of a Tragedy – Kashmir 1947* (Roxford Books 1994) 96.

territory of Kashmir. It was noted that the tribesmen's invasion only accelerated the occupation of Kashmir, as the plan to harass the Maharaja to accede to India was already set in process by Congress leadership. This conclusion was reached on the basis that Mountbatten was lobbying for Nehru to force the Maharaja to join the dominion of India.⁴³ He also visited Kashmir and later on sent Lord Ismay and Gandhi to persuade the Maharaja to accede to India. The statement of Sir Conrad Corfield suggests that Mountbatten ignored the advice of the Indian Political Department against partisan behaviour towards Nehru, who in turn was obsessed with the idea of incorporating Kashmir into India⁴⁴ as it was his ancestral land.

The option for Kashmir to independently govern its affairs is evident in the Standstill Agreement with Pakistan and the legal opinions of Fitzmaurice.⁴⁵ The Standstill Agreement that Kashmir had with Pakistan made the Maharaja's accession to India illegal, as both the Standstill Agreement with Pakistan and the Instrument of Accession (IOA) to India related to the same subject matter, i.e. the control of foreign affairs. Fitzmaurice argued that the Standstill Agreement placed the foreign relations of Kashmir into Pakistan's hands. Therefore, the Maharaja was neither a free agent nor in a position to accede to India, except with the prior consent of Pakistan.⁴⁶ Furthermore, the IOA was conditional to the conduct of a plebiscite. Hence the IOA neither allowed India to exercise any sovereignty over the territory of Kashmir nor authorised it to make laws in the area of defence, foreign affairs, and communications. As discussed, India acted in contravention of the IOA and set up the Nominated Government to import Indian laws into Kashmir. India chose to enjoy its purported rights

43 S Choudhry, 'Kashmir and the Partition of India the Politicians and the Personalities Involved in the Partition of India Particularly in Relation to the Position of Kashmir at the Moment of Independence on 15 August 1947' (MPhil thesis, University of Bradford 1990) 206; FO 371/84244: Validity of Kashmir's accession to India, 1950 [NAL]; Henry Vincent Hodson, *The Great Divide: Britain, India, Pakistan* (OUP, Karachi 1988) 385.

44 Conrad Corfield, 'Some Thoughts on British Policy and the Indian States 1935–47' in C.H. Philips and M.D. Wainwright (eds), *The Partition of India, Policies and Perspectives 1935–1947* (Allen and Unwin 1970) 531.

45 HW17/17 & FO 371/69710: Foreign Office, Minutes, Mr. Fitzmaurice, 'Validity of Kashmir's Accession to India', 27 February 1948 [NAL]. F 10914/10125/85: Fitzmaurice's Opinion on Legal Validity of Kashmir's Accession to India, 26 May 1949 appended to 'The Right Hon. P.J. Noel Baker (Commonwealth Relations Office) to Sir Hartley Shawcross (enclosed only) 3 June 1949 [CRO].

46 F 10914/10125/85: Fitzmaurice's Opinion on Legal Validity of Kashmir's Accession to India, 26 May 1949 appended to 'The Right Hon. P.J. Noel Baker (Commonwealth Relations Office) to Sir Hartley Shawcross (enclosed only)' 3 June 1949 (Unpublished Source) para 3.

under the IOA and completely ignored its obligation to conduct a plebiscite. The final result of these omissions suggests that the IOA is *invalid* and *null and void*. It also suggests that India did not have any legal title recognised under international law to Kashmir, and that Kashmir was seized by illegal occupation.

It was also demonstrated that within the framework that Britain crafted for the decolonisation of the British India under Indian Independence Act (IIA) 1947 Kashmir was entitled to remain independent. As discussed, under Section 7 (1)(a) of the IIA 1947, the Princely States that did not join any of the dominions by 15 August 1947 were the responsibility of Britain. It was therefore argued that Kashmir was eligible to be on the list of Non-Self-Governing Territories (NSGTs). As demonstrated, the list of NSGTs is not exhaustive and territories have been removed from it (like Hong Kong) or added back onto it (like New Caledonia). On that basis, it was argued that Kashmir is entitled to reclaim its colonial borders under the principle of *uti possidetis* and exercise its right to self-determination.

Further, as issued under Chapter VI of the UN Charter, UN SCR 122 of 24 January 1957 recognises the right to self-determination of the people of Kashmir and states that, 'the final disposition of the state of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations'. The modalities of such a plebiscite were previously spelt out in SCR 47 of 21 April 1948. Clearly, under international law, the Kashmiri people's right to self-determination continues to exist and has not been extinguished by any subsequent Indian constitutional measures or through local elections. The entire territory of Kashmir remains disputed and the question of its right to self-determination should not be confused with the false Indian assertions that Kashmir is trying to secede from its union. For cases of secession, the seceding territory must have been a *de jure* part of the mother state.

As reviewed, the need for an UN-administered plebiscite has been effectively endorsed by UN Security Council Resolution 122 of 1957. The Nominated/Pro-Indian government in Kashmir does not have the competence to decide the status of Kashmir. As the Security Council made clear, the future shape and affiliation of the whole of Kashmir or any part thereof cannot be decided by the 'All Jammu and Kashmir National Conference' directly or through the Assembly, and any such attempt would not constitute a legal disposition of the state.

Clearly, there is no rule within international law that prohibits holding a referendum or plebiscite on the question of the future status of Kashmir. Indeed, there is a legal obligation to hold a plebiscite, which even India previously has

accepted. However, such a plebiscite has still not taken place. In the 1950s, the United Nations Security Council and the Commission established a plebiscite administration under the authority of the president of the Security Council with the help of the Commission on India and Pakistan, but a series of plebiscite administrators were unable to secure a situation on the ground. The last plebiscite administrator finished his term in 1956.

The British policy on *political* self-determination in the Indian subcontinent often involved conducting plebiscites to determine the will of the people, which the referendums in Sylhet and Junagadh demonstrate.⁴⁷ In view of this policy, the people of Kashmir were entitled to a plebiscite even before the Kashmir question was brought to the notice of the UN. In that respect, Kashmiris were entitled to self-determination through decolonisation. Instead, Britain chose to abandon the territory, leading India and Pakistan to occupy Kashmir, which as a result was wiped from the map through the illegal use of force.

Historically, Kashmir was never a part of India or Pakistan it was not legally made a part of India at the time of decolonisation. India, after illegally occupying the territory of Kashmir, started to incorporate it within its union through constitutional means. As shown, India took numerous illegal steps during the process of incorporation such as: nominating the Pro-Indian Government; including Article 370 into the Constitution of India to export Indian laws into Kashmir and labelling it an integral part of India; concluding the Delhi Agreement 1952 with the Pro-Indian/Nominated Government to try to legitimise the highly questionable IOA; framing the new constitution for Kashmir in 1957; changing the population in Kashmir through settlement policies; implementing various other policies to destroy the ethnic and cultural ties of *Kashmiriyat*; and violating the human rights of people through imposed military rule. Many of these changes were achieved in total disregard of the IOA, which is a treaty that in principle governs the relationship between Kashmir and India. It was shown in this study that these forced constitutional changes do not cure illegal occupation, and that they are instead evidence of attempts to legitimise India's unlawful occupation of Kashmir. Hence, the forceful constitutional incorporation of Kashmir by India into its union is neither valid nor has it affected the mental continuity of Kashmiris over the last 70 years regarding their right to exercise self-determination. The struggle to exercise self-determination

47 Hodson, (n 43) 346; Bidyut Chakrabarty, 'The Hut and the Axe: The 1947 Sylhet Referendum', (2002) 39 *Indian Economic Social History Review* 317, 317; M Ramaswamy, 'Constitutional Developments in India 1600–1955', (1956) 8 *Stanford Law Review* 326, 335–36.

continues, and Kashmiri youths continue to be killed and children continue to be blinded by the illegal use of pellet guns by the Indian security forces.⁴⁸

There is a common consensus that virtually every election that has been conducted in Kashmir since 1951 has been manipulated or rigged. The Plebiscite Front and other pro-independence parties were banned and are excluded from contesting the elections, as they insist on the conduct of a plebiscite. The Pro-Indian Government was nominated to suppress the Kashmiri people's calls for self-determination. As far as the claim that Kashmiris are participating in elections with the assistance of the Pro-Indian/Nominated Government is concerned, it is a damaging policy of killing with the illusion of kindness, as the present government is not the true representative of the people of Kashmir and did not come to power through the will of the people. Indeed, India has occupied Kashmir with the assistance of 700,000 military troops, who are virtually immune from prosecution. In terms of what little law there is governing their conduct, they are given draconian powers, which include the right to shoot with the intention to kill.⁴⁹

The Indian government has adopted an even more hard-line approach to Kashmir since the BJP⁵⁰ came to power in 2014.⁵¹ As a nationalist Hindu party, the BJP has always prioritised the Hindu polity and, based on their official ideology of *Hindutva* (meaning Hinduness), has denigrated other groups, inciting violence against minorities.⁵² For instance, the BJP's invective policies are responsible for the beef murders, where people who sell or are thought to

48 Bernard Smith, 'Pellet guns take toll on civilians in Indian-administered Kashmir' (*Al-jazeera*, 23 April 2017) <<http://www.aljazeera.com/video/news/2017/04/pellet-guns-toll-civilians-indian-administered-kashmir-170423052248825.html>> accessed 19 June 2017; Nazir Gillo, 'Troopers fired pellets at people coming out of mosque' (*Kashmir Reader*, 18 June 2017) <<http://kashmirreader.com/2017/06/18/troopers-fired-pellets-people-coming-mosque/>> accessed 19 June 2017.

49 See the Armed Forces (Jammu and Kashmir) Special Powers Act 1990 (AFSPA) (particularly sections 4(a)–(d), and 7), and Jammu and Kashmir Public Safety Act 1978 (JKPSA).

50 The BJP originates from the party called Bharatiya Jana Sangh, founded by Syama Prasad Mookerjee in 1951 by collaboration with the Hindu nationalist volunteer organisation, the Rashtriya Swayamsevak Sangh (RSS). Smita Narula, 'Overlooked Danger: The Security and Rights Implications of Hindu Nationalism in India' [2003] 16 *Harvard Law School Human Rights Journal* 41, 42.

51 Staff, 'India Elections 2014' *The Guardian* (London, 16 May 2014) <<https://www.theguardian.com/world/2014/may/16/india-election-2014-results-live>> accessed 2 December 2016.

52 Shanoor Seervai, 'The Rising Tide of Intolerance in Narendra Modi's India' (*Kennedy School Review*, 27 July 2016) <<http://harvardkennedyschoolreview.com/the-rising-tide-of-intolerance-in-narendra-modis-india/>> accessed 19 June 2017; Narula, (n 50) 42.

sell beef are murdered by Hindu fundamentalists.⁵³ The Jana Sangh and RSS, which are closely associated with the BJP, have targeted lower caste Hindus as well as people from other religions, including Christians and Muslims. In October 2015, there were riots in Kashmir after a trucker was murdered in a majority-Hindu area of Jammu because people thought he was transporting cows. This came after a Hindu group blackened the face of a Kashmiri legislator for serving beef at a party.⁵⁴ The BJP's project of Hindu nationalism, in particular the 'rewriting' of the history of India as Hindu rather than secular, has been a large trigger for unrest in Kashmir. Enflamed Pakistanis across the border react towards the injustices committed against their Muslim brethren in Jammu and Kashmir, the only Muslim majority state in India, further embroiling Kashmir in conflict.

Furthermore, it is noteworthy that in early 1953 Jana Sangh campaigned for the complete incorporation of the state of Jammu and Kashmir into India.⁵⁵ As a result, the founder of Jana Sangh, Shyama Prasad Mukherjee, was arrested in May 1953 for breaching orders from the Kashmir government that were put in place to prevent him from entering Kashmir and later died in jail due to heart attack. It has been the official policy of the BJP since to remove all the autonomy provisions for Kashmir and fully integrate it within the union of India. Furthermore, the BJP is firmly committed to retain the draconian Armed Forces (Jammu & Kashmir) Special Powers Act 1990,⁵⁶ which entrenches impunity as it both gives armed forces wide-ranging powers to shoot and kill civilians as well as necessitates that the central government to give their consent to conduct prosecution against people who campaign for the exercise of right to self-determination of Kashmiris.⁵⁷ Between 1991 and 2015,

53 Indrani Basu, 'Six Outrageous Things BJP Leaders Have Said About Dadri Murder Over Beef' *Huffington Post* (New York, 6 October 2015) <<http://www.huffingtonpost.in/2015/10/01/six-outrageous-things-bjp-leaders-have-said-about-dadri-murder-o/>> accessed 2 December 2016.

54 Staff, 'Clashes erupt in Indian Kashmir over beef killing' <<http://www.reuters.com/article/us-india-politics-protests-idUSKCN0SE1Z220151020>> *Reuters* (London, 20 October 2015) accessed 19 March 2017.

55 Narula, (n 50) 54.

56 Staff, 'BJP rejects withdrawal of PSA from Kashmir' *Pakistan Observer* (Islamabad, 18 March 2017) <<http://pakobserver.net/bjp-rejects-withdrawal-of-psa-from-kashmir/>> accessed 19 March 2017.

57 Amnesty International, "DENIED" Failures in accountability for human rights violations by security force personnel in Jammu and Kashmir' (Amnesty International 2015) 7.

the Indian government did not grant permission to prosecute in a single case.⁵⁸ Throughout the latter part of 2016, the ongoing violence in Kashmir resulted in many deaths. The mass blinding of unarmed protestors and other civilians including children as young as four years old⁵⁹ marked an especially gruesome period in the decades-long conflict. There have also been no attempts to properly investigate or provide justice for these victims. Despite such atrocities, it has been consistently seen that Kashmiris have pushed for independence from not only India but also Pakistan.⁶⁰ While most of the literature has been focused on India's aggression in Jammu and Kashmir, according to the ILC India and Pakistan could both be considered to be aggressors in the Kashmir conflict as seen in the following statement:

...it was conceivable for both combatants to be aggressors, if they failed to carry out the provisions of the Charter (Article 2, Para. 4) prohibiting the use of force... for example, Pakistan and India decided to go to war on the subject of Kashmir and to settle the issue by a sort of trial by combat.⁶¹

This book did not discuss the situation in Pakistan Occupied Kashmir (POK) and Northern Kashmir in detail because, as explained in Chapter 1, Pakistan has not constitutionally incorporated Kashmir within its federation. It is however noteworthy that the claim that POK has an *azad* (free) government is largely untrue. In reality, the civilian government in POK follows the dictates of the government in Islamabad, the legislative assembly creates laws in line with Pakistani officials, and the Election Commission is comprised of members

58 Sudha Ramachandran, 'India's Controversial Armed Forces (Special Powers) Act' *The Diplomat* (Washington D.C., 2 July 2015) <<http://thediplomat.com/2015/07/indias-controversial-armed-forces-special-powers-act/>> accessed 19 March 2017.

59 Ashiq Hussain, 'In Kashmir, pellet gun victims are as young as 4 years' *Hindustan Times* (New Delhi, 21 July 2016) <<http://www.hindustantimes.com/india-news/in-kashmir-pellet-gun-victims-are-as-young-as-4-years/story-1tMf1PBrubqxTw3f5V3IgL.html>> accessed 10 March 2017; KS Subramanian, 'Use of Pellet Guns and Human Rights Violations in Kashmir' (*The Citizen*, 20 June 2017) <<http://www.thecitizen.in/index.php/OldNewsPage/?Id=8554&Use/of/Pellet/Guns/and/Human/Rights/Violations/in/Kashmir>> accessed 20 June 2017.

60 Jha, (n 12); Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (I.B. Tauris 2000) 27–48.

61 See, ILC, Summary record of the 94th meeting, Question of defining aggression Document A/CN.4/SR.94, 98, para 95 (extract from the Yearbook of the International Law Commission, vol 1, 1951).

acceptable to Pakistani authorities.⁶² This is compounded by the fact that three of the four major political parties in POK are extensions of Pakistan-based parties, and that political groups calling for the independence of Kashmir are forbidden from partaking in elections under the 1974 constitution imposed by Pakistan.⁶³ The Jammu and Kashmir Liberation Front, for example, which was founded before Partition to rally for the independent state of Jammu and Kashmir, was subsequently destroyed by the Pakistani military.⁶⁴

Furthermore, human rights violations are also rampant in POK, which leads Kashmiris to demand accountability and independence.⁶⁵ Torture is routinely conducted by Pakistani military and intelligence.⁶⁶ Kashmiri refugees and former militants from IOK are constantly surveilled, harassed, arrested, and beaten, and some are killed. There is limited freedom of expression or association and political dissidents – including those promoting Kashmiri self-determination rather than accession to Pakistan – face military and paramilitary reprisals.⁶⁷ Independence-related publications are often banned.⁶⁸ Vote rigging and electoral fraud is the norm.⁶⁹ There is furthermore no accountability for the forced disappearances of thousands of people.⁷⁰ Media freedom is highly restricted in POK.⁷¹ Restricting access to information shrouds abuses.⁷² Overall, there are strong criticisms that arbitrary arrest and detention, torture, disappearances, and extrajudicial killings are routine in POK too, and there is complete

62 Shams, (n 20).

63 Christophe Jaffrelot, *Pakistan: Nationalism without a Nation* (Zed Books 2002) 296.

64 Gaurav Bhatnagar, 'The Islamicization of Politics: Motivations for Violence in Kashmir' (2009) 20 (1) *The Journal of Politics and Society* 1.

65 Brad Adams, 'Pakistan: "Free Kashmir" Far From Free' *Human Rights Watch* (New York, 21 September 2006) <<https://www.hrw.org/news/2006/09/21/pakistan-free-kashmir-far-free/>> accessed 19 March 2017.

66 Human Rights Watch, "'With Friends Like These...': Human Rights Violations in Azad Kashmir' (HRW 20 September 2006) Vol 18, No 12(C), 54.

67 *ibid* 7.

68 *Human Rights Watch World Report 2007* (Seven Stories Press, 2007) 306.

69 Aili Piano, *Freedom in the World 2009: The Annual Survey of Political Rights and Civil Liberties*. (Rowman & Littlefield 2009) 860; Staff, 'Pakistan: Abuses Feared in Kashmir Elections' *Human Rights Watch* (New York, 7 July 2006) <<https://www.hrw.org/news/2006/07/07/pakistan-abuses-feared-kashmir-elections>> accessed 19 March 2017.

70 Asian Legal Resource Centre, 'Pakistan: Thousands Of Persons Remain Missing' *Scoop* (Wellington, 27 August 2010) <<http://www.scoop.co.nz/stories/WO1008/S00470/pakistan-thousands-of-persons-remain-missing.htm>> accessed 19 March 2017.

71 Selig S Harrison, 'China's Discreet Hold on Pakistan's Northern Borderlands' *The New York Times* (New York, 26 August 2010).

72 Human Rights Watch, (n 66) 6.

impunity for perpetrators. The occurrence of human rights violations in India as well as Pakistan suggests that both parts of Kashmir are mal-administered, making the conduct of plebiscite all the more important. The people of Kashmir have become collateral damage in a proxy war.

In terms of regional politics, there have also been allegations from the USA that Pakistan's economic and regional aspirations are influencing its policy on Kashmir, particularly the Gilgit-Baltistan region in the northwest, ceding control to China in aid of CPEC.⁷³ This has involved allowing Chinese troops to join Pakistani troops to quell any political or rights-based opposition. The militarisation of the areas that Pakistan controls, like the militarization of IOK, has been for the political aims of the governments involved and without concern for the protection of Kashmiris.⁷⁴ For example, stark criticisms were levelled against the behaviour of the militaries on both sides of the Line of Control after the 2005 earthquake, despite both countries claiming that their troops were there to protect the best interests of the Kashmiri people.⁷⁵ As a Human Rights Watch report from 2006 states,

... [As] time passed and the sound of life beneath the rubble began to grow silent, it became painfully and brutally clear that the hope was misplaced. In the aftermath of the disaster, the Indian and Pakistani militaries simply did not make the saving of Kashmiri lives a top priority. As India and Pakistan engaged in diplomatic one-upmanship – making and refusing offers of help based on political opportunism rather than humanitarian concerns – the death toll mounted.⁷⁶

As discussed, the principle of self-determination and democracy are inter-related, as democracy forms an internal element of self-determination and is necessary for meaningful political participation in the process of government. The absence of democracy and the presence of unrepresentative government therefore justifies claims for external self-determination.⁷⁷ Such claims are stronger when there are human rights violations. In the context of Kashmir, it

73 Selig S Harrison, 'China's Discreet Hold on Pakistan's Northern Borderlands', *The New York Times* (New York, 26 August 2010).

74 Human Rights Watch, (n 66) 5.

75 *ibid* 4.

76 *ibid* 4.

77 See generally, Milena Sterio, 'On the Right to External Self-determination: "Selfistans", Secession, and the Great Powers' Rule' (2010) 19 *Minnesota Journal of International Law*

was shown that the Pro-Indian Government is not representative in character as it is not based on democratic principles and does not protect the human rights of the people of Kashmir. At the domestic level, Government of India's failure to abide by the provisions of the IOA remains a major cause of Kashmir's decaying autonomy, the disaffection of its people, and the resort by some to armed rebellion. In this context, it is also important to note that due to the restrictions placed on media freedoms throughout Kashmir, the reports of armed rebellion are likely to be exaggerated, as the limited coverage allowed shows that even peaceful protests are met with horrific retaliation by the state.⁷⁸

As this study shows, the Nominated Government in Kashmir can be categorised as an unrepresentative government in terms of the 1970 Friendly Relations Declaration. There are no stable political institutions in Kashmir, no effective administration, and no real representation as people are not allowed to elect their own leaders and are denied equal participation in elections. India's asserted authority is allegedly based on the 'free will of the people' in Kashmir. As this study submits, the presence of the Pro-Indian Government planted in Kashmir amplifies the arguments for allowing the Kashmiri people to assert their right to external self-determination, with reference to the 1970 Declaration. Furthermore, it was argued that under this declaration the people of Kashmir have the option to constitutionally separate from their forced union with India. The option of separation remains open to Kashmir under the 1970 Declaration because it is an occupied territory and not legally a part of India. The forced constitutional union is based on unlawful accession. As discussed in Chapter 1, the Kashmir question is not a minority rights issue or a case of secession like in Kosovo (Serbia), Abkhazia (Georgia), South Ossetia (Georgia), Kurdistan (Turkey), Chechnya (Russia), Biafra (Nigeria), and Bangladesh (Pakistan). In Kashmir, the presence of human rights violations did not generate the self-determination claim. Rather it is the people's movement for self-determination and the restoration of their historical title that has resulted in the human rights violations in Kashmir. As such, the separation of Kashmir from India would at the best be called 'constitutional secession' as against the traditional 'secession', which only applies to situations where the seceding entity is legally a part of the state it is seceding from.

This study has demonstrated that Kashmiris had the right to external self-determination in the colonial context and that they continue to do so in the

78 Mirza Waheed, 'India's crackdown in Kashmir: is this the world's first mass blinding?' *The Guardian* (London, 8 November 2016) <<https://www.theguardian.com/world/2016/nov/08/india-crackdown-in-kashmir-is-this-worlds-first-mass-blinding>> accessed 30 November 2016.

modern era too, due to the protracted illegal occupation, the unrepresentative Pro-Indian Government, and the widespread human rights violations. It was made clear that in the post-colonial period the historical argument in the context of Kashmir has transformed into the democratic one. Hence the right to self-determination has strengthened the claim for the restoration of historical title.

In Chapter 6, the importance of state practice and precedents in the development of international customary law was discussed. However, where a state does not want their behaviour to become law (i.e. if they prefer to act contrary to Kant's categorical imperative), they must claim that their acts have been so unique and particular to a situation that they must not be considered as contributing to a change of law (they express their *opinio non juris*).⁷⁹ As correctly illustrated by Professor Müllerson, whether certain situations, facts, or acts serve as precedents greatly depends on whether one is interested in seeing them as precedents or not.⁸⁰ It is apparent that over the years many scholars have based their work on their ideologies and prejudices rather than the facts of the situation in Kashmir, and have therefore portrayed the Kashmir question in ways that suit their analysis, describing it as *sui generis* and unique so that it is no longer necessary to view India's promise to conduct the plebiscite in Kashmir as a legal and moral requirement. Some scholars seem to shut their eyes to the fact that the international community, in supporting and concluding the SCRs and other declarations on the Kashmir question (particularly SCR 47 (1948),⁸¹ SCR 91 (1951),⁸² 122 (1957),⁸³ SC UNCIP of 13 August 1948 and 5 January 1949), has already committed itself to a legal view that they cannot abandon. Clearly, the international community has adopted a legal position through these Resolutions that requires demilitarisation⁸⁴ and the conduct of a free and impartial plebiscite.⁸⁵ From the discussions in Chapter 5, it became clear that the international community did not recognise the establishment of the Jammu and Kashmir Constituent Assembly; nor did they accept the constitutional incorporation of Kashmir into the Union of India through the New Constitution of Kashmir 1957. The international community was against the

79 Rein Müllerson, 'Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia' (2009) 8 Chinese Journal of International Law 2, 2.

80 *ibid* 2.

81 SCR 47, 21 April 1948.

82 SCR 91, 30 March 1951.

83 SCR 122, 24 January 1957.

84 UNCIP SCR, 13 August 1948.

85 SCR 47, 21 April 1948 and UNCIP SCR, 5 January 1949.

incorporation because they were concerned that it might create a legal excuse for India to not implement the UN SCRs on Kashmir,⁸⁶ particularly the promised plebiscite.⁸⁷ For these reasons, the Security Council passed SCR 91 (1951) and SCR 122 (1957) and affirmed the international community's legal position in the following words:

*Any action that assembly [JKCA] may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the assembly, would not constitute a disposition of the State.*⁸⁸ (Emphasis added)

In Chapter 6 it was discussed that a review of the declarations made by way of unilateral acts by the international community concerning legal or factual situations in Kashmir shows that they have created legal obligations, since it was the intention of the States to be bound to the terms of the UN SCRs on Kashmir. As such, these resolutions have the character of a legal undertaking and the States must follow a course of conduct that is consistent with the UN SCRs on Kashmir.⁸⁹ It was discussed that the international community's legal position, with their agreement being the basis for the *opinio juris* on Kashmir, forms collective 'consent' or 'custom', and hence has become binding within international law and cannot be abandoned by the international community. The *Eastern Greenland Case*⁹⁰ strengthens this argument, as it shows that an 'official statement' made by the members of international community creates a legal obligation that is binding under international law and must be honoured. Accordingly, it was asserted that the international community is bound to its 'consent', and that demilitarisation followed by the conduct of a plebiscite in Kashmir is required under international law. For the reasons outlined in this study, the international community is estopped from altering its legal position. It also became clear that despite the Soviet veto on two of the SCRs on Kashmir, the USSR accepted the other SCRs that called for demilitarisation and the conduct of a plebiscite in Kashmir. Hence, it becomes clear that

86 FO 371/129772: DY1041/177: Constitution of Kashmir (P. B Lewis, Delhi to A.A. Golds, Commonwealth Relations Office, POL. 106/4 of 5 February 1957) [NAL].

87 *ibid.*

88 FCO 37/914: Letter dated 21 January 1971 from the Permanent Representative of Pakistan to the UN (A. Shahi) addressed to the president of the SC, 21 January 1971 [NAL].

89 See, *Nuclear Tests (New Zealand v France)* (Judgment) (1974) ICJ. Rep 457, 472, para 46.

90 *Legal Status of Eastern Greenland* (1933), PCIJ at 70–72.

Russia, being the successor state to the USSR, is obliged to abide by this legal commitment.

International law and state practice shows that the international community does not recognise changes that are effectuated by the illegal use of force.⁹¹ It is also not an absolute requirement for legal validity that a state is recognized by other states. It is the principle of effectiveness that defines statehood. Hence, recognition is only one of the factors that can be considered when deciding whether a state validly exists under international law. It is therefore argued that effective control over a territory and people is important in order to claim title over the territory. It is common practice for occupiers to dismiss lawful local governments and to carry out domestic changes, as in case of the Baltic States.⁹² However, such acts do not cure the illegality of occupation. In the *Namibia* Case, the ICJ was of the opinion that Members of the UN are under an obligation to recognise the illegality and invalidity of South Africa's continued presence in Namibia.⁹³ It was concluded that the international community, including Russia, has not recognised Kashmir as part of India, which remains a disputed territory.

It was argued in Chapter 6 that the international community's foreign policy became uncertain and non-committal after the signing of the Simla Agreement 1972, as they were exhausted by Indian evasion tactics over the plebiscite. It was concluded that the policy of bilateralism adopted by the international community after the signing of the Simla Agreement shows a strategy of indifference, leaving the Kashmir question for India and Pakistan to deal with as they please, which has produced no results whatsoever for the last few decades. This has proved counterproductive and led to a zero sum contest. Today, Kashmir is a potential nuclear battlefield between India and Pakistan, who remain outside the protection frameworks of the Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear-Test-Ban Treaty. The study conducted by the Rand Corporation estimated that in an event of nuclear war between India and Pakistan, it would kill two million people instantaneously, cause colossal casualties of over a hundred million and contaminate

91 Article 2(4) of the UN Charter 1945; Resolution 1514(xv) of 14 December 1960; 2131(xx) UN GA, 20th Sess. Official Records, Supp. No. 14 (A/6014) 11 (21 December 1965); 2160(xx1) Resolution 2160 (xx1), 30 November 1966; 3314(xxix) GA Res. 3314 (xxix), 14 December 1974; Preamble of Vienna Convention on the Law of Treaties Signed at Vienna 23 May 1969 entry into Force: 27 January 1980; Van Elsuwege, (n 13) 377.

92 Kazimierz Maolej Smogorzewski, 'Lithuania', *Encyclopedia Britannica* (1961) 217.

93 Advisory Opinion ICJ Reports 1971, 54 (para 118).

a substantial part of the world with radioactive fallout.⁹⁴ It is submitted that ignoring this kind of threat demonstrates complete irresponsibility on the part of international community.⁹⁵

As discussed, the crisis in Kashmir could also be targeted by Al-Qaeda and ISIS/ISIL, types of extremism. It is clear that Al-Qaeda and ISIS/ISIL have the goal of forming a pan-Islamic revolutionary network against the West.⁹⁶ In the past, Al-Qaeda has intervened and exploited crises in places like Bosnia and Kosovo, where non-Muslims oppressed the Muslim majority population.⁹⁷ In the present study it was asserted that there is a real likelihood for problems in Kashmir due the proximity of Kashmir with Afghanistan. The presence of the non-Muslim occupier, India, might attract Al-Qaeda to extend its arc of extremism into Kashmir.⁹⁸ They invite strong military retaliation from governments, exploitation and the brainwashing of besieged populations. Such dangers have increased in India after the ruling nationalist Hindu party, the BJP, gave a free hand to fundamentalist groups such as Jan Sangh and RSS to commit atrocities towards minorities.⁹⁹

In the past, the Indian government has been deeply criticised for its handling of the insurgency. Their conflation of Kashmiri nationalism with terrorism appears to be a key justification for the increasingly violent and lawless actions they have taken over the last few years. For instance, in the summer of 2016, Burhan Wani, the 22-year-old leader the Hizbul Mujahideen in Kashmir, was killed in a planned encounter by Indian security forces. He had four police cases registered against him, none of which had resulted in a death, and there was no reason why he could not have faced trial.¹⁰⁰ Insurgents have faced trials

94 Eric S Margolis, *War at the Top of the World-The Struggle for Afghanistan, Kashmir and Tibet* (Taylor & Francis 2002) ix & x.

95 Gary Goertz and Paul F. Diehl, 'International Norms and Power Politics' in Frank W. Wayman and Paul F. Diehl (eds), *Reconstructing Realpolitik* (The University of Michigan Press 1994) 109–12.

96 Gus Martin, *Understanding Terrorism- Challenges, Perspectives and Issues* (2nd edn, Sage Publications 2006) 293.

97 *ibid* 292; MC Ruppert, *Crossing the Rubicon-The Decline of the American Empire at the End of the Age of Oil* (New Society Publishers 2004) 116.

98 Alex P Schmid, 'The WForward on Counter-terrorism: Global perspectives' (2016) 2 *Strathmore Law Journal* 49, 72–73; Michael Safi, 'Kashmir Conflict Shifts with Top Militant Vowing Fight is for an Islamic State' *The Guardian* (London, 22 May 2017) <<https://www.theguardian.com/world/2017/may/22/kashmir-conflict-shifts-top-militant-fight-islam-independence-zakir-musa>> accessed 24 May 2017.

99 Seervai, (n 52); Narula, (n 50) 42.

100 Prem Shankar Jha, 'Kashmir is in Danger of Spinning out of Control' (1 August 2016) <<http://www.premshankarjha.com/category/kashmir/>> accessed 29 May 2017.

in Kashmir before, particularly in the 1990s.¹⁰¹ Wani could have been classed as an extremist threat but he was fundamentally known as a Kashmiri nationalist and his death was followed by a cycle of nonstop protests and state violence.¹⁰² Furthermore, in May 2017, the killings of two key Hizbul Mujahadeen figures led to mass mourning and protests across Kashmir. Protestors, including young people, were met with extreme violence. Internet and phone services were cut, strict curfews were imposed, and most areas were shut down.¹⁰³ Rather than increasing their control, the government's increasing use of force appears to be crippling Kashmir and destroying any hope of peace and stability. In the background of the increased and gruesome violence in Kashmir, some extremist leaders have recently made the worrying declaration that they wish to create an Islamic state in Kashmir distinct from both India and Pakistan under Sharia law.¹⁰⁴ Kashmiri youth are increasingly subjected to violence and see little future for themselves.¹⁰⁵ This worrying development is the result of the 70 years of conflict, which has side-lined the wishes of people and sowed the seeds of alienation amongst the Kashmiri youth. In my understanding, the creation of radicalised youth is the result of the Indian government's authoritarian approach in Kashmir, just as draconian western polices in the Middle East created the vacuum for the monster of ISIS.¹⁰⁶ Having witnessed the current turmoil in Kashmir, it is rather alarming that some educated Kashmiri youth seem to be turning towards rebellion. This is rather a dangerous recent development that has occurred in Kashmir, and educated Kashmiri youth are becoming vulnerable targets of ISIS-style of ideology, which is attempting to extend its arc of extremism from the neighbouring countries, such as Afghanistan and Pakistan.

It is significant to note that such ideas do not represent the mainstream position of the All Parties Hurriyat Conference, which represents the major sentiments of Kashmiri people. The All Parties Hurriyat Conference denounces terrorism and distances themselves from the radicalised movement, which is connected to groups like Al Qaeda and the Hezbollah Mujahideen.¹⁰⁷ However, the extreme violence used by the Indian state over last seven decades has

101 *ibid.*

102 *ibid.*

103 Abid Bashir, 'Kashmir shuts down to mourn militants' *Greater Kashmir* (Srinagar, 28 May 2017) <<http://www.greaterkashmir.com/news/front-page/kashmir-shuts-to-mourn-militant-killings/250689.html>> accessed 29 May 2017.

104 Safi, (n 98).

105 Jha, (n 12).

106 Annalise Lekas, 'ISIS: The Largest Threat to World Peace Trending Now' (2015) 30 *Emory International Law Review* 313.

107 Safi, (n 98).

clearly opened the door for the conflict to be exploited for the political aims of terrorist groups.

In the past the Indian government has used a mixture of force and persuasion to make the separatists eschew violence in favour of negotiation and accommodation.¹⁰⁸ However, a notable turning point towards the current crisis was the 2008 crackdown, followed by the government's ending of dialogue with the All Parties Hurriyat Conference and the further delegation of power to the police to use extreme force towards any actors who are seen to threaten Indian control over Kashmir. The Indian government's policy since then has emphasised cracking down on any person or group that threatens their narrative, and fighting a proxy war with Pakistan at the expense of Kashmiri lives.

The spread of terrorism from POK has been a significant fact. While those supporting the independence of Kashmir are persecuted, terrorist organisations targeting IOK for the integration of Jammu and Kashmir into Pakistan are funded and trained by Pakistani authorities. Many terrorist organisations like Lashkar-e-Taiba (founded by Hafiz Saed, most well known as being responsible for the 2008 Mumbai terror attacks) are based in POK and are believed to receive support from Pakistan's Inter-Service Intelligence spy agency.¹⁰⁹ While terrorism in POK is deeply intertwined in the conflict between India and Pakistan post-Partition, it is understood to be an external factor that affects the Kashmir question, rather than one that creates it.¹¹⁰

In fact, the spread of terrorism from POK to parts of South Asia and around the world should make it imperative for the international community to come together to resolve the Kashmir problem, which could also prevent Kashmiris from falling victim to terrorism. As the 70 years of unrest and political mishandling of the Kashmir problem shows, a cosmetic solution or the political point-scoring of India and Pakistan will not work. The Kashmir crisis should not just be understood as a bone of contention in the dog fight between India and Pakistan. It is an international problem, both due to these nuclear powers and their proxy war, as well as the potential spread of terrorism from POK, which presents a real danger that the international community should be alert to before ISIS exploits the situation and finds anarchic sympathizers in Kashmir.

108 Prem Shankar Jha, 'Kashmir is in Danger of Spinning out of Control' (1 August 2016) <<http://www.premshankarjha.com/category/kashmir/>> accessed 29 May 2017.

109 Hassan Abbas, 'Pakistan through the Lens of the Triple A Theory' (2006) 30 (1) Fletcher Forum of World Affairs 181, 182.

110 Praveen Swami, *India, Pakistan and the Secret Jihad: The Covert War in Kashmir, 1947–2004* (Routledge 2006).

Clearly, the escalation of state violence in the region and the rise in violent insurgency, along with the growing frustration among those who have tried to use peaceful means to settle the conflict,¹¹¹ could lead to an extremely volatile and internationally catastrophic situation in this region where unregulated nuclear powers and the disproportionate use of force prevail. For these reasons, it is argued in this book that leaving the Kashmir conflict to fester could deeply destabilize world peace, which would be a terrible foreign policy blunder by all major states. Therefore, it is imperative that the international community act to defuse the situation to stop Kashmir from being used as the site of a proxy war between India and Pakistan, and to stop international terrorist groups from taking advantage of the chaos to pursue their nihilist ends. Under these circumstances, it would be untenable for the international community to continue to pursue bilateralism as its key policy towards the conflict. It has been shown in this study that the Simla Agreement is not a legally credible basis for promoting bilateralism over the international legal commitments regarding Kashmir, since it was signed following the creation of Bangladesh to end hostilities following the 1971 war between India and Pakistan over the East Pakistan conflict.¹¹² Clearly, the Simla Agreement was not meant to be a resolution of the Kashmir issue.

As this study has shown, members of the international community are prevented from pursuing foreign policy positions that are inconsistent with their legal position, which is based on the SCRs as well as the official statements of individual states. It has been suggested that the cricket¹¹³ and bus ride¹¹⁴ diplomacy that has taken place in the name of bilateralism are neither going to facilitate the exercise of the right to self-determination of the people, nor assist the foreign policy objectives of the international community. Today, Kashmir has become a far more volatile and dangerous issue due to the potential nuclear and terrorist threats.

While it may appear that promoting bilateralism helps states that are not directly involved in crisis situations to continue trade and stay out of difficult issues, such tactics are ultimately detrimental to long-term peace, the prevention of terrorism, the rights of marginalised groups, and the overall development of human rights and security across the world. When a crisis involves

111 Jha, (n 12).

112 The Simla Agreement (2 July 1972) para 1(ii).

113 Former Pakistani President Musharraf came to New Delhi for three-day visit from 16–18 April 2005 to watch the one-day cricket matches between India and Pakistan. See, Samuel, 'Too Much of Hype' *Greater Kashmir* (Srinagar, 23 April 2005) 7.

114 Staff, 'Second Bus passengers Cross LoC' *Greater Kashmir* (Srinagar, 22 April 2005) 1.

international law, norms, and standards, it is not morally or legally acceptable to leave vulnerable people to the whims of parties that are clearly acting in their own self-interest and in contravention of *jus cogens* norms. It is therefore imperative that members of the international community must align their foreign policy with their legal position and renounce bilateralism, which is essentially a policy of not challenging the *status quo*. They must also come to see that India has used the cherry picking approach to international law,¹¹⁵ and pleads colonial victimisation as the basis for rejecting some of its obligations.¹¹⁶ Nonetheless, India claims sovereignty to Kashmir, which would at most be a colonial acquisition.¹¹⁷ Therefore, there is a clear need for the international community to come forward and impose their collective legal position in the form of a SCR. The policy of leaving the status quo unchallenged is unsustainable, counterproductive, and dangerous for the region as well as the international community as a whole.

A Normative Framework *de lege ferenda* for Kashmir: A UN Security Council Resolution

The Kashmir question, as discussed in this book, has assumed a catastrophic magnitude and is one of the most dangerous and longest unsolved international disputes at present. The Kashmir conflict manifests as a multi-layered phenomenon with a broad range of contributing factors.¹¹⁸ The danger stems from the prolonged nature of the crisis, particularly the multiple episodes of warfare between India and Pakistan, two nuclear powers.¹¹⁹ This study has

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- 115 For example, India adopted a 'non-alignment' policy during the Cold War era, nominally to reject a polar view of the world. Tony Carty and Fozia Nazir Lone, 'Some New Haven International Law Reflections on China, India and Their Various Territorial Disputes' (2011) 19 *Asia Pacific Law Review* 93, 98.
 - 116 For instance, India has not ratified the Non-Proliferation Treaty of 1968 and has rejected of the Rotterdam rules on carrier liability. See, Kundan Jha, 'The Rotterdam Rules – Should India Ratify?' (2013) 3 *Rev. Drept Mar.* 69, 72.
 - 117 Carty and Lone, (n 115); BS Chimni, 'International Law Scholarship in Post-colonial India: Coping with Dualism' (2010) 23 *Leiden Journal of International Law* 23, 23.
 - 118 Holger Wenning, 'Kashmir: A Regional Conflict with Global Impact' (2003) 1 *New Zealand Journal of Public and International Law* 197, 202.
 - 119 Kingsley de Silva, 'Terrorism and Political Agitation in Post-Colonial South Asia: Jammu-Kashmir and Sri Lanka' in RC Thakur (ed), *South Asia in the World: Problem-Solving Perspectives on Security, Sustainable Development and Good Governance* (United Nations University Press 2004) 84, 88.

shown that the Kashmir crisis is not merely a territorial boundary dispute between India and Pakistan, as many have asserted,¹²⁰ but is instead a case of illegal occupation. This is precisely the reason why 70 years of conflict and the empty promise of bilateral negotiations have not been able to resolve the Kashmir problem. The right to self-determination must play a significant part in the peaceful resolution of the Kashmir crisis. India and Pakistan, with the assistance of the international community, must work towards an agreed resolution.¹²¹

Given the clear lessons from the past seven decades, it is extremely unlikely that the Kashmir dispute will be resolved without action being taken by the international community under the auspices of UN Charter under Chapter VII. In 1948, Fitzmaurice realised that peace and security could never be restored in Kashmir unless a fair solution was decided upon and imposed by the SC.¹²² Similarly, in 1948 Mr. Mason (UN Political Department), commenting on the legal rights of SC action in Kashmir, was of the view that the need of the hour was for the SC to act to impose a just solution for Kashmir, rather than to act as a mere 'policeman'.¹²³ Further, any future SCR resolution must treat the Kashmir question as a legal problem and not merely as a political issue. Some authors,¹²⁴ including Jr. Kirgis, have rightly pointed out that the reason why the SC has failed to bring a permanent resolution to Kashmir is its longstanding treatment of the issue as political rather than legal problem.¹²⁵ Clearly, first and foremost, the Kashmir question is a legal problem, though its resolution is based on the political will of the international community.

As demonstrated in this book, the legal position of the international community has been established and fortified by the SCRs passed under Chapter VI of UN Charter, as well as in their 'unilateral declarations'. During the late 1940s to the early 1950s, India agreed to the conduct of the plebiscite. However,

120 See, AE Theodosiou, 'International Property Disputes: How Do We Resolve Them before They Break into War?' (1994) 5 *Touro International Law Review* 225; Sumathi Subbiah, 'Security Council Mediation and the Kashmir Dispute: Reflection on its Failures and Possibilities for Renewal' (2004) 27 *Boston College International and Comparative Law Review* 173; Sumit Ganguly, *The Origins of War in South Asia: The Indo-Pakistani Conflicts since 1947* (Westview Press 1994) 9–10.

121 Brian Farrell, 'The Role of International Law in the Kashmir Conflict' (2003) 21 *Penn State International Law Review* 293.

122 Kashmir, Minutes, Fitzmaurice, 25th February, 1948. Ref: 371/69710.

123 See, Kashmir, Minutes, 24th February 1948, Ref: FO 371/69710.

124 Pauline Dawson, *The Peacekeepers of Kashmir* (Hurst & Co. 1994) 23.

125 Frederic L Kirgis Jr., 'The United Nations at Fifty: The Security Council's First Fifty Years' (1995) 89 *American Journal of International Law* 506, 527–29.

India is now denying¹²⁶ the right to self-determination to the Kashmiri people, despite their earlier acceptance of that right. It has to be strongly noted that the lack of a plebiscite further undermines the highly questionable legality of the IOA, which the Maharaja of Kashmir allegedly signed to cede Kashmir to the government of India. As discussed in Chapter 4, the IOA was made conditional to the conduct of plebiscite.¹²⁷ Hence, it is clear Kashmir cannot legally be ceded without the exercise of right to self-determination in the form of plebiscite by the people of Kashmir.¹²⁸

As such, the proposed SCR and the endorsement of past SCRs¹²⁹ on Kashmir that call for the conduct of plebiscite and for the people to be allowed to exercise their right to self-determination is significant, as it would not only help to resolve the Kashmir dispute, but also because it could grant some legitimacy to the government of Kashmir. The conduct of a plebiscite not only has great appeal to people all over world,¹³⁰ but it, as discussed in this chapter, is a legal obligation that the international community has created. It is argued that the international community, including India, is estopped due to their unilateral actions from changing their legal position after accepting the need to conduct a plebiscite in Kashmir. As is apparent from the *Namibia Case*,¹³¹ as well as the other discussions in previous sections, the SCRs passed under Chapter VI are binding even if they are not necessarily enforceable.

This study, as a normative framework *de lege ferenda* for the resolution of Kashmir issue, proposes that the international community should promulgate the proposed SCR under the terms of Chapter VII of the UNC. A mandate under a UN SC Resolution would have significant influence on the range of responsibilities that India as an occupying power possesses under occupation law towards the civilian population in Kashmir. The proposed UN SC Resolution under Chapter VII will then also control military forces deployed into a

126 Khan, (n 20) 373.

127 FO 371/129775: Letter Dated 27 October 1947 from Governor General of India Mountbatten to Maharaja of Kashmir [NAL].

128 Christopher Bromhead Birdwood, *India and Pakistan: A Continent Decides* (Praeger 1954) 58–59; Statement of Representative of India Mr. G. Ayyangar in the SC on 15 January 1948 in K Sarwar Hasan (ed), *The Kashmir Question – Documents on the Foreign Relations of Pakistan* (Pakistan Institute of International Affairs 1966) 140.

129 Ali Khan, 'The Kashmir Dispute: A Plan for Regional Cooperation' (1994) 31 *Columbia Journal of Transnational Law* 495, 516.

130 Telegram from the Embassy in India to the Department of State, New Delhi, February 20 1964 in *FRUS 1963–1968*, Lyndon Johnson, Vol. xxv, South Asia (2000) 16, 32, 34–35.

131 *Namibia Case*, ICJ Rep, 1971, 51.

territory and establish UN civilian administration.¹³² The proposed scheme for the SCR is legitimised by the legal principles enumerated under that chapter, which provide a remedy for situations that present a threat to the peace or breaches the peace, as the Kashmir crisis does. The Security Council, under Article 39 of UNC, can determine whether there is any breach or threat to the peace and can make recommendations and decide what measures should be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.¹³³ Furthermore, certain SCRs (namely, 774,¹³⁴ 902,¹³⁵ and 1203¹³⁶) demonstrate that an unresolved situation constitutes a continuing threat to peace and security. The lack of progress in the settlement of a dispute not only creates a source of political instability in a particular region,¹³⁷ but the failure to negotiate in good faith may constitute one of the various elements in the determination of a threat.¹³⁸ Further, the fact that 'efforts to resolve the dispute peacefully had not yet been completely exhausted' does not prevent the SC from considering the situation as a threat to the peace.¹³⁹ As discussed in previous sections, in the contemporary world order, the festering Kashmir crisis poses a threat of there being an escalation to nuclear warfare, a spread of terrorism, and gross human rights violations. In this context, not finding a just resolution to the Kashmir conflict is a threat to global peace and security and, as such, the Security Council has the obligation to take corrective measures if all the permanent members agree, without Indian consent.¹⁴⁰ This study proposes nine major recommendations as *lex ferenda* under the proposed SCR on the Kashmir question, which include the requirements to: (1) immediately

132 David J. Scheffer, 'Beyond Occupation Law' (2003) 97 American Journal of International Law 842, 859.

133 Article 39 reads: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'.

134 Resolution 774 Cyprus (26 August, 1992) para 10.

135 SCR 902 (1994), Achieving of an agreement on the confidence-building measures relating to Varosha and Nicosia International Airport, Cyprus, para 1.

136 SCR 1203 (1998) on the situation in Kosovo.

137 SCR 1429 (2002) The situation concerning Western Sahara (30th July 2002).

138 SCR 913 (1994) 'The situation in Bosnia and Herzegovina, particularly in the safe area of Gorazde and political settlement of the situation in the former Yugoslavia' (22nd April 1994).

139 Karel Wellens, 'The UN Security Council and New Threats to the Peace: Back to the Future' (2003) 8 Journal of Conflict & Security Law 15, 35–36.

140 FO 371/69710: see Minutes dated 25 February 1948.

stop all hostilities, violence and repression; (2) initiate a phased withdrawal of the Indian and Pakistani troops from all parts of Kashmir to achieve demilitarisation; (3) disarm the various armed insurgent groups; (4) assist in the safe and free return of all displaced persons, including Kashmiri migrant *Pandits* (Hindus); (5) allow for unobstructed work by humanitarian aid organisations; (6) deploy an effective UN civil and military presence in Kashmir; (7) establish the necessary self-government infrastructure; (8) conduct a plebiscite to determine title of the territory of Kashmir and restore historical title if that is what the population desires; (8) ensure conditions for a peaceful and normal life for all the inhabitants; and (9) seek an ICJ advisory opinion on the legal issues involved in the Kashmir question.

As explained above, in order to achieve these principled political targets, the two main aims of the proposed SCR would be to establish a UN Military-Political Transitional Administration for Kashmir (UNMPTAK) and to seek an ICJ advisory opinion on the legal issues involved in the Kashmir question. Following their findings, the UNMPTAK should achieve certain objectives in a certain order. Firstly, it should secure peace and effectively administer the territory of Kashmir, and this political administration should govern Kashmir until its future is decided. Secondly, the proposed UNMPTAK should ensure demilitarisation by India and Pakistan, deploy UN forces, and finally initiate a popular plebiscite to ascertain the will of the people.

The UNMPTAK would very much function like the UN Interim Administration Mission in Kosovo (UNMIK), which governed Kosovo from 1999. The Declaration of Independence by Kosovo (on 17 February 2008) clearly indicated that Kosovo would continue to be governed through international bodies established there on the basis of UN SCR 1244 (1999)¹⁴¹ until such time as its institutions are capable of assuming their responsibilities.¹⁴² Likewise, effective administration was achieved in East Timor until its independence on 20 May 2002¹⁴³ through SCR 1272, which established a UN Transitional Administration in East Timor (UNTAET).

The SC, through the UNMPTAK, would mandate the deployment of UN forces to ensure the demilitarisation of the region by Indian and Pakistani forces, as well as assist in the conduct of the plebiscite to determine the will of the Kashmiri people as to their future. The deployed UN Forces would replace the

141 SCR 1244, S/RES/1244(10 June 1999) (The Aathasari plan).

142 Kosovo Declaration of Independence 17 February 2008, para 5 <<http://www.assembly-kosova.org/?cid=2,128,1635>> accessed 3 December 2016.

143 Erika De Wet, *The Chapter VII powers of the United Nations Security Council* (Hart Publishing 2004) 166.

UNMOGIP,¹⁴⁴ which is an Observer UN force at the Line of Control. These UN forces would initiate the phased withdrawal of Indian and Pakistani military forces from Kashmir and establish a safe and secure environment. These forces would very much work like the Kosovo Force (KFOR), an authorised NATO-led peacekeeping force in Kosovo under a UN mandate. The UNMPTAK would also assist in conducting a peaceful and democratic plebiscite. To achieve this purpose, the UNMPTAK could work similarly to the UN Mission in East Timor (UNAMET), which was formed under SCR 1246¹⁴⁵ and provided for the popular consultation in East Timor.

As explained, Kashmir, under the UNMPTAK framework, would operate like a Non-Self-Governing Territory (NGST). UNMPTAK would assume the functions of an administering power and govern Kashmir like an NSGT, except that it would deploy UN forces to demilitarise the region. The creation of UNMPTAK would automatically end the illegal annexation and restore the historical title of Kashmir. The territory of Kashmir would also be reunited on the basis of the *uti possidetis* principle. Therefore, the proposed SCR would achieve exactly what could have been achieved in 1947 if Britain had declared Kashmir an NSGT. It could have possibly stopped the war of 1947 and the subsequent occupation of Kashmir.

It is believed that, at present, establishing the UNMPTAK under the proposed SCR remains a realistic and achievable solution for Kashmir. This solution also has the capacity to assist the international community in achieving its other foreign policy objectives, and is an opportunity for them to show commitment to their legal position on Kashmir under the SCRs. The second main aim of the proposed SCR would be to seek an ICJ Advisory Opinion under Article 96 of the UNC on the legal questions relating to Kashmir. The present study has clearly demonstrated that the Kashmir question is a multi-layered legal problem. Therefore, it would be productive to seek an ICJ opinion on issues including the validity of the IOA under the circumstances in which it was concluded and, hence, it would clarify several legal questions related to the Kashmir conflict, such as (1) the legitimacy of the occupation; (2) the legality of the Indian constitutional incorporation of Kashmir into its Union; (3) the effect of not conducting a plebiscite on the occupation and incorporation; (4) the authenticity of the installed Nominated Government; (5) ongoing

144 United Nations Military Observer Group for India and Pakistan, which was deployed at the dividing line between Indian and Pakistani-controlled areas of Kashmir in 1949.

145 SCR 1246 (11 June 1999) Para 1; J Purnawanty, 'Various Perspectives in Understanding the East Timor Crisis' (2000) 14 Temple International and Comparative Law Journal 65, 67; De Wet, (n 143) 165.

violations of human rights in Kashmir; (6) the construction of multi-layered fencing in *Gurez* valley and *Purna Tulail* in Indian Occupied Kashmir and its effect on the human rights of the Kashmiri people, and other key issues.

It must be recalled that the idea of referring the question of the legality of the IOA to the ICJ has been floated in international circles from the very inception of the Kashmir conflict. As the archival documents suggest, in 1948 Mr. Mason, from the UN Political Department,¹⁴⁶ as well as Fitzmaurice the Foreign Office Legal Advisor,¹⁴⁷ suggested seeking an ICJ opinion on the legality of the IOA. In 1957, the Swedish Minister of Foreign Affairs, Mr Uden, also proposed to refer the situation to the ICJ.¹⁴⁸ It is argued that seeking an advisory opinion on these legal issues would add credence to the Security Council actions under the proposed SCR. However, an advisory opinion would not fundamentally alter the course of action that the Security Council would need to take under the proposed resolution. The Security Council does not need to wait for the outcome of an advisory opinion before acting. This is because the exigency for the Security Council action in Kashmir under the proposed SCR would not be determined by whether the present dangerous situation was created by legal or illegal acts. It would be solely decided on the basis that the present *status quo* is a threat to international peace and security.

This SCR would therefore help to achieve the policies and objectives of the international community, end the occupation, restore the people's historical title to the territory of Kashmir, unite the divided territory of Kashmir, remove the unrepresentative Nominated Government, restore democracy, and end the widespread human rights violations. It is argued that peace and security may never be restored in the region unless the Kashmir question is decided by imposing SC action through the political assistance and encouragement of the international community.

Concluding Remarks

As discussed in this book, the application of the right to self-determination as a means to determine the will of the people is majorly hampered by systemic difficulties related to definitions, comprehension, application, and

¹⁴⁶ FO 371/69710: See Minutes, 25 February 1948.

¹⁴⁷ *ibid.*

¹⁴⁸ FO 371/129777: DY1041/46(A): Outward Telegram from Commonwealth Relation Office: To UK High Commissioner in Australia, India and Pakistan, 26 January 1957.

administration.¹⁴⁹ While examining the Kashmir question, a balance has to be struck between ‘the theoretical and *realpolitik* sides of self-determination’,¹⁵⁰ as there can be no possibility of peace in Kashmir if such a balance is not achieved. The Kashmir crisis is a result of unabated violence and historical injustices and as long as they continue, violence is bound to persist.¹⁵¹ It was suggested that the legal position held by the international community should be buttressed by the UN through another SCR. The UN must come to see that the legal position held under the various prior SCRs needs to be realised, as the very dangerous political situation in Kashmir requires a remedy. The study proposes an SCR under Chapter VII, which would not only give a realistic outline of the objectives that should be pursued and the order in which they should be achieved to solve the Kashmir question, but would also benefit the international community in a multitude of ways. Therefore, it is important that the international community reaffirms its legal commitment to secure a just and lasting political solution for Kashmir. It would have to provide for the exercise of the right to self-determination by the people of Kashmir so that they can restore their historical title. Finally, this chapter makes it clear that when we look to resolve the Kashmir question through the international system, law and politics remain linked. However, if the political actions of all parties were in line with the international legal position, particularly the key commitments to demilitarisation and a plebiscite, there would be political benefits for all in terms of peace and security.

The preceding chapters of this book critically evaluate Kashmir’s statehood under international law using an interdisciplinary approach, and investigate the application of the principles relating to the restoration of historical title through the exercise of the right to self-determination by its people. It has become clear that Kashmir is capable of being seen as an illegally annexed state under international law, and has a strong claim to its historical title and its territory, which was illegally seized through deception and occupation.

It was concluded that the people’s ‘mental continuity’ – the ethnic and cultural principles of *Kashmiriyat* and the resistance to Indian occupation over the last 70 years – have preserved the identity of Kashmir as a state. It has been argued that the relationship between Kashmiri people and the territory of their state is important, and that SCRs on Kashmir clearly validate

149 John A Collins, ‘Self-determination in International Law: The Palestinians’ (1980) 12 Case Western Reserve Journal of International Law 137.

150 *ibid* 138.

151 Henry Cattan, *Palestine and International Law* (2nd edn, Longman 1973) 164. Author argued similarly for the Palestinians.

this by giving Kashmiris the right to decide the future of their territory through a plebiscite. The Indian government, both from the centre and through the local administration, has imposed repressive measures in Kashmir that amount to systematic human and cultural destruction. Kashmir is a highly militarised region, which shows that India is holding Kashmir not by ballots but with bullets, which is ethically and legally unacceptable.

This study demonstrates that the Kashmir situation is fundamentally a legal question. Utilising an inter-disciplinary approach, this research has also shown that the Kashmir question cannot be solved at the domestic level without the international community's assistance. It was also made clear that a broad study of the Kashmir question at the international level is not possible without looking into the domestic issues and changes that India made immediately after securing the invalid IOA. In this connection, Müllerson rightly says that 'any comprehensive study of issue of an international character has to look deep into domestic matters and vice versa, one cannot comprehend what is going on within States if international issues are not taken account of'.¹⁵² Furthermore, the constant violence and human rights violations as well as lack of genuine democracy in IOK over the last 70 years, cannot be ignored. People are deeply disillusioned about the political process and know they will not get justice or representation. They are also brutally attacked by the state when they engage in peaceful protests. In the April 2017 Lok Sabha by-elections there was a record low turnout of around 6.5%–26% less than the previous round – accompanied by mass boycotts and the killing of protesters by police.¹⁵³ These merciless killings by government forces are enflaming the conflict and alienating the people, particularly the youth, from any faith in the political process.¹⁵⁴ The attempt to use the façade of democracy to legitimize the political and physical domination of Kashmiris is being roundly rejected by the population. Clearly, these domestic realities have to be taken into account and it must be accepted that only a free and fair plebiscite that allows the Kashmiri people to decide on their future can provide an end to the ongoing crisis. Any resolution

152 Müllerson, (n 10) 195.

153 Fahad Shah, 'Police kill civilians in Kashmir by-election clashes' *AlJazeera* (Qatar, 10 April 2017) <<http://www.aljazeera.com/news/2017/04/police-kill-civilians-kashmir-election-clashes-170409165721414.html>> accessed 29 May 2017.

154 PTI 'Srinagar Bypoll: Only 2% Voter Turnout Recorded after Repolling in Kashmir' *Hindustan Times* (New Delhi, 26 May 2017) <<http://www.hindustantimes.com/india-news/srinagar-by-election-only-2-02-voter-turnout-recorded-after-repolling-in-kashmir/story-3lCTvA4P1sYB4eXo4EeRjM.html>> accessed 29 May 2017.

for the vexing Kashmir situation must take into consideration the deep political problems explained throughout this book.

As discussed, from the perspective of international law, the people of Kashmir are entitled to the restoration of historical title through self-determination. However, it was made clear that this legal right cannot become reality without the political willingness of the international community to implement it through collective enforcement actions. In this context, it was argued that the international community is committed to the legal position that the people of Kashmir have the right to self-determination and should decide on the future of their territory. This legal position is fortified by SCRs, as well as in the 'unilateral declarations' that the individual states have made in the past. The decision in the *Eastern Greenland Case* made it clear that where the international community has created a legal obligation, they cannot abandon it. Accordingly, they are estopped from acting in contravention to their declared intent. Hence, it is the responsibility of the international community to oppose the Indian claims to sovereignty over Kashmir, as the territory was seized and illegally occupied in contravention to international law. It is also the duty of international law scholars to rise above their own prejudices and the interests of their own states, and to analyse the Kashmir situation based on actual facts rather than seeing the matter through the tainted glasses of their governments. In the contemporary world there seems to be a greater consensus among international law scholars that our understanding of self-determination needs to be reshaped in ways that could reflect its broader imperatives and allow for more consistency.¹⁵⁵

It must not be forgotten that foreign policies are not same as legal positions, which are formulated by precedents and international bodies through collective decision-making. Creating foreign policy that contradicts the accepted legal position can only frustrate attempts to resolve the issues involved. In particular, the foreign policy of promoting bilateralism adopted by the international community is in conflict with their legal position. States must align themselves to international law and remind themselves of the real dangers of nuclear war and the threat of Al-Qaeda and ISIS-type terrorism being brought into Kashmir to exploit the violent situation. As this book has shown, the situation in Kashmir can be a threat to international peace and security because of such issues, and the Security Council must act under Chapter VII of UNC to

¹⁵⁵ Khazar Shirmammadov, 'How Does the International Community Reconcile the Principles of Territorial Integrity and Self-Determination: The Case of Crimea' (2016) 4(1) Russian Law Journal 61, 93.

resolve the situation. It was proposed that an SCR should be adopted on the Kashmir question and the UN Military Political Transitional Administration for Kashmir be set up urgently to effectively administer, demilitarise, and conduct a plebiscite in Kashmir.

This resolution would also address the calls for self-determination by Kashmiris, and thereby resolve the territorial aspect of the Kashmir question. It is therefore obligatory for the international community to recognise its legal commitment and exert its influence to urge and pressurise India to accept third party interventions. It must be recognised that a casual approach towards illegal occupation is contrary to international law and the Indian occupation of Kashmir should be no exception. The restoration of the Baltic States after 51 years of Soviet occupation clearly shows that repression cannot last forever: it has to end to allow for a lasting peace.

Perkins remarks that international law reacts to the behaviour of nations and believes that 'actions today in disregard of international law will lead to a tightening of the rule of law'.¹⁵⁶ It is argued that excusing the serious disrespect of international law seen in the Indian occupation of Kashmir makes future infractions easy to justify by other nations that might share similar imperial designs. Such a situation would be a dangerous precedent for other nations, and the world could slide into the chaos and disorder. The international community should not act as if, as Mieville suggests, 'the chaotic and bloody world around us is the rule of law'.¹⁵⁷ In fact the international community must come to appreciate John Locke's recommendation that '...the end of law is not to abolish or restrain but to preserve and enlarge freedom ... where there is no law, there is no freedom'.¹⁵⁸ Therefore, this is the appropriate time for the UN to realise its duty and for the international community to make the appropriate foreign policy choices to achieve a lasting peace in the region.

Having critically examined the Kashmir question, it would be naïve or probably too ambitious to suggest that the international community will change their foreign policy overnight or that there could be a speedy settlement to the Kashmir question. Until the international community again takes up its responsibility to resolve the illegal occupation of Kashmir, the human rights violations against Kashmiri people will continue to be perpetrated. In the context of the Kashmir question, as seen in other similar circumstances, the illegal

156 John A Perkins, *The Prudent Peace: Law as Foreign Policy* (The University of Chicago Press 1981) 15.

157 China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Brill 2004) 319.

158 John Locke, *The Second Treatise of Government* (R. Butler 1821) 234.

occupation has not been not legitimized by the sheer fact that it took place, but because other states ignore their legal position and do not make any effort to take action against such illegality. In situations where the international community quickly responds, like in Kuwait, it can stabilize a situation. Even in a situation where they have been slow to realise their legal commitments, like the Baltic States, their intervention remains necessary to produce results and end illegal occupation.

Based on the legal and factual background of the Kashmir question, it is my view that there is hardly a shadow of doubt that the Kashmiri people, whether they are in contemporary Pakistan or India, have fulfilled the legal conditions for them to have the right to exercise self-determination. However, legal solutions for sensitive international issues relating to territory are not possible without collective political action taken by the international community under the auspices of the Security Council. Hence, it is not ultimately law or logic that can lead to a resolution to the Kashmir question, but the willingness and collective power of the international community. The UN and various individual states have accepted that Kashmir is a disputed territory. The message is loud and clear that Kashmir is not a part of India or Pakistan, and that the people deserve a chance to decide the future of their territory.

This study calls for some optimism, a hope that the international community will recognise its legal responsibilities in the near future and navigate a way through the murky waters of Indian and Pakistani politics to give a tangible future for Kashmir. While the people of Kashmir are waiting for the international community to live up to their legal obligations, this study and the adoption of a multidisciplinary approach to the Kashmir question can generate positive scholarly activism by reaching a broader audience in areas beyond formal international law, such as human rights, politics, diplomacy, etc. The multidisciplinary approach this study has adopted has also provided space for a thorough legal reflection on the Kashmir question. Other scholars might seek to undertake a similar approach in order to better understand the subjectivity and *realpolitik* within the discipline of international law, which includes power and state interests, and see how they relate to the concept of the right to self-determination. It is in these moments of analysis, articulation, and discussion that a 'change'¹⁵⁹ may happen in the understanding of the Kashmir question. In fact, contemporary international law scholarship demonstrates that a greater consensus to move towards reshaping

159 Michael Fakhri, 'Introduction – Questioning TWAIL's Agenda' (2012) 14 Oregon Review of International Law 1, 15.

the normative content of international law,¹⁶⁰ including the concept of self-determination, through critical narratives and strategies that could reflect its broader imperatives in a consistent manner can help to address entrenched problems.¹⁶¹

Furthermore, activism and campaigning by international organisations from all over the world is required in order to pressurise their respective governments to end their support for the Indian occupation and Pakistani aggression, and to urge India to fulfil its international legal obligations by allowing Kashmiris to exercise their right to self-determination and restore their historical title to their territory. Both India and Pakistan need to pursue enduring and compassionate policies that could allow new opportunities for resolving the crisis, rebuilding social trust, reconciling the youth, and constructing resilient and democratic governance within Kashmir.

Finally, it is expected that this research monograph will generate the scholarly interest and activism required to study the Kashmir question at an intellectual and academic level from the perspective of the substantive law discussed in this study. From that viewpoint, this work is only the first step in this direction, with much more to follow.

160 David Kennedy and Chris Tennant, 'New Approaches to International Law: A Bibliography' (1994) 35 *Harvard International Law Journal* 417, 421–22; Lama Abu-Odeh, 'Post-colonial Feminism and the Veil: Considering the Differences' (1992) 26 *New England Law Review* 1527; Müllerson, (n 79), 2; B.S. Chimni 'Third World Approaches to international Law: A Manifesto' (2006) 8 *International Community Law Review* 3, 3; Müllerson, (n 10); Nathaniel Berman, *Passion and Ambivalence. Colonialism, Nationalism and International Law* (Martinus Nijhoff 2011).

161 Thomas W Simon, 'Remedial Secession: What the Law Should Have Done, from Katanga to Kosovo' (2011–12) 40 *Georgia Journal of International & Comparative Law* 105, 113; B Wells, *United Nations Decisions on Self-Determination* (New York University 1963) 1–14; Tom Frank, 'Post-modern Tribalism and the Right to Secession' in C Brolmann, R Lefebvre and M Zieck (eds), *Peoples & Minorities in International Law* (Martinus Nijhoff Publishers 1993) 3, 6; Fozia Nazir Lone 'The Creation Story of Kashmiri People: The Right to Self-Determination' (2009) 21 *Denning Law Journal* 1; MV Krishnan 'African Contribution to the Development of the Principle of Self-determination' (1966) 5 *African Quarterly* 312; Barry Sautman, 'Tibet's Putative Statehood and International Law' (2010) 6 *Chinese Journal of International Law* 127, 138; Colin Mackerras, *China's Ethnic Minorities and Globalization* (Routledge 2003); Dru C. Gladney, *Ethnic Identity in China: The Making of a Muslim Minority Nationality* (Forth Worth 2004); Christopher J. Borgen, 'The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of self-Determination in the Cases of Kosovo and South Ossetia' (2009–10) 10 *Chicago Journal of International Law* 1, 2; Fakhri, (n 159).

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Index

The following abbreviations are used in the index: COI for the Constitution of India, IOA for Instrument of Accession, IOK for Indian Occupied Kashmir, J&K for Jammu and Kashmir (Princely State) and POK for Pakistan Occupied Kashmir.

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